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THE HONOURABLE TIMOTHY FRANCIS CARMODY SC, Commissioner

MS K McMILLAN SC, Counsel Assisting
MR M COPLEY SC, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS INQUIRY ACT 1950
COMMISSIONS OF INQUIRY ORDER (No. 1) 2012
QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

BRISBANE

..DATE 23/04/2013

Continued from 14/03/13

DAY 27

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THE COMMISSION COMMENCED AT 9.44 AM

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COMMISSIONER: Good morning, everyone. Mr Copley.

MR COPLEY: Good morning, Mr Commissioner. Perhaps it's as well to announce appearances first.

COMMISSIONER: Yes, I'll take appearances.

MR COPLEY: I appear with my learned friend, Mr Woodford, as counsel assisting.

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COMMISSIONER: Thank you. Mr Selfridge.

MR SELFRIDGE: Yes, good morning, Mr Commissioner. Selfridge, initial G, appearing on behalf of the state of Queensland.

COMMISSIONER: Leaderless today, Mr Selfridge. Mr Harris.

MR HARRIS: Good morning, Commissioner. I appear on behalf of Ms Annette Harding/Macintosh and Ms Shelly Farquhar.

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COMMISSIONER: Thank you. Yes, Mr Bosscher.

MR BOSSCHER: Good morning, Commissioner. I appear on behalf of Mr Lindeberg as per orders made previously by you.

COMMISSIONER: Thank you. Mr Copley.

MR COPLEY: Since this inquiry last sat the government amended the order in council that governs its operations. I tender a copy of the Queensland Government gazette dated 5 April 2013, page 488.

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COMMISSIONER: Thank you. The amended order in council will be exhibit 349.

ADMITTED AND MARKED: "EXHIBIT 349"

COMMISSIONER: Yes, Mr Copley.

MR COPLEY: One of the purposes of convening today was to hear evidence from another witness. That other witness is Dean MacMillan Wells. I call him.

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WELLS, DEAN MacMILLAN sworn:

ASSOCIATE: For recording purposes please state your full name and your occupation?---Dean MacMillan Wells. I'm a lawyer.

23/4/13

WELLS, D.M. XN

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COMMISSIONER: Good morning, Mr Wells. Welcome? 1
---Commissioner.

MR COPLEY: Could the witness be shown this document,
please.

You can remain seated. Now, is that a statement that
you've prepared for your appearance today?---Yes, it is.

And you've signed it and dated it 22 April 2013?---Yes, I
did. 10

All right. Now, before we do anything further with that
statement, is the position this, that you wanted to also
convey to the commission of inquiry your reason or reasons
for not seeking to invoke the doctrine of public interest
immunity?---Yes, it is. I wish to waive crown privilege
and I'd be grateful if the statement I've drafted could
become part of the records of the commission, so as a
matter of courtesy to the legal professional, of which I'm
a member, they would understand why I am not abiding by
Westminster convention.

I'll just get you to have a look at this document, please, 20
and ask you is that a copy of the statement you wanted to
make about public interest immunity?---Yes, it is.

All right. That's not a signed copy but that doesn't
matter, it's a copy of a statement that you made, isn't
it?---Yes, it is.

Well, I tender the statement concerning the waiver of
public interest immunity as the second exhibit today.

COMMISSIONER: Thank you. I'll just have a read of it. 30
Exhibit 350. Just excuse me while I have a read of it.

ADMITTED AND MARKED: "EXHIBIT 350"

COMMISSIONER: Mr Wells, thank you. I've read your waiver
statement. The inquiry appreciates the sentiments you've
expressed and your gesture in assisting it to perform its
investigative function, but I just want to remove any doubt
about the position by noting a couple of matters for the
record. Cabinet deliberations of documents are suppressed
on principle because full disclosure is likely to unduly
prejudice the overall public interest. Strictly speaking 40
this is an immunity not a privilege. Accordingly, when it
genuinely applies it can neither be ignored by a court or a
tribunal, nor can it be validly waived by a witness.

The immunity is not an absolute one, it can be displaced by
higher considerations. Here the public interest in a full
and open inquiry, the relevance and significance of the
information at issue, and whether it has already been in

the public domain, as well as the curative effect of the passage of time have to be balanced against the realistic likelihood that good government will be injured by premature disclosure. While the power of persuasion can never be underestimated, any attempt to keep what was said in cabinet about what happened to the Heiner documents in 1990 is not likely to have succeeded if it was put to the test at this inquiry.

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The purpose of the immunity is dislodged by the overriding public interest in reviewing the adequacy, appropriateness and lawfulness of the decision, and that can't be done without knowing why cabinet acted as it did. The public can be assured that if I thought there was any legal basis for applying the immunity it would already have been applied without the need for any witness to raise it. Thank you.

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MR COPLEY: Now, I tender Mr Wells's statement dated 22 April 2013 and after it's marked - well, I'll hand up a copy for you, Mr Commissioner.

COMMISSIONER: Thank you.

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MR COPLEY: And have the original marked and returned to Mr Wells so he's got it available to him.

COMMISSIONER: Exhibit 351.

ADMITTED AND MARKED: "EXHIBIT 351"

COMMISSIONER: Mr Selfridge, just while that's being done, my understanding is that Mr Wells appears unrepresented or representing himself in a professional and personal capacity.

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MR SELFRIDGE: That's my understanding, sir.

COMMISSIONER: Right. But you don't appear for him?

MR SELFRIDGE: I don't appear for him.

COMMISSIONER: Okay, thank you.

MR SELFRIDGE: They were my instructions.

COMMISSIONER: Thank you. Yes, Mr Copley.

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MR COPLEY: Mr Wells, cabinet first came to consider the question of Mr Heiner and his inquiry on 12 February 1990. Would you agree?---Yes.

And one of the purposes of cabinet considering Mr Heiner and his inquiry was to do with Mr Heiner being provided with an indemnity should the need arise for him to meet

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costs or anything that might have arisen out of his inquiry. Would you agree with that?---Yes, that's correct.

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All right. Prior to the cabinet meeting on 12 February 1990 you would have received a copy of the submission that was going to be made to cabinet by the sponsoring minister, wouldn't you?---I believe so.

Yes. Well, I'll just get you to have a look at exhibit 151, please?---It was usual for cabinet submissions to appear in the cabinet bag a few days before the cabinet meeting.

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Yes?---Occasionally they didn't. I expect that this was one that appeared in the cabinet bag.

Just have a look at it. Probably forget about the very first page because that's just the minute of the decision, but if you look at what follows. You'd be familiar with these documents generally, wouldn't you?---Yes.

Right, because they apparently followed a fairly set format, didn't they, in terms of how they were structured?---Yes.

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And the headings that appeared on them?---Yes.

Okay. So just look through that for as much time as you need and then I'd just like to ask you again whether or not you have a recollection of actually seeing that before the cabinet meeting on 12 February 1990?---I have a recollection of seeing it at the cabinet meeting. I can't be certain whether it was one of those that was in the cabinet bag or whether it was one that came to us on the day, but I think that it was one of the ones that was in the cabinet bag and, yes, certainly I've seen it before.

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So you probably would have seen it before the meeting? 1
---Probably.

Yes?---Probably, yes.

Yes, and if you did see it before the meeting, you would have read it?---Yes.

Yes?---Yes, it was my habit to read the whole cabinet bag on the Sunday night before the meeting.

Right; and did you notice that on the second page of the exhibit which is the first page of the cabinet submission headed "Cover Sheet" under the paragraph headed "Purpose and Issues" in the third paragraph down it provided that current government policy provides for crown employees to be indemnified from costs?---Yes. 10

Did you notice that when you read it?---Yes.

And did you also notice that on page 5 of the document under the heading "Objective" there was a quote or three paragraphs that were apparently drawn from the statement of policy of the cabinet of 1982 regarding indemnification of employees for matters that might arise out of the course of their duties?---Yes. 20

All right. Now, you said in your statement at paragraph 16 if you want to look at it - this is the statement that you prepared - that you thought that you only spoke once at the cabinet meeting on 12 February 1990, as far as you can remember?---I think so, yes.

Leaving aside other matters in that paragraph, you state in paragraph 16 you said that you said to the cabinet, "We should be very sure there was no better way of handling the matter before we destroyed the documents"?---Yes. 30

Right. Did it occur to you that the cabinet policy from 1982 whereby government employees, crown employees, could be indemnified for the legal costs and any damages that might arise from actions they took in good faith as government employees would be apt or suitable to protect any of these employees should any legal action have been brought against them?---When I said that, it was something which was pretty much in accordance with the sort of things that other cabinet ministers were saying and that's why we ended up asking for further options. No, it didn't occur to me that that might be one possible way of going. It occurred to me that there might possibly be other ways of going and we needed to check those out and a number of cabinet ministers thought that and consequently the next cabinet submission was an options paper. This was something that cabinet did not wish to rush into. 40

So it wasn't an option or an avenue that you raised for cabinet on 12 February, that they could just use the policy that had been around since 1982 to protect the staff as an alternative to destroying the documents?---The tendency of the cabinet discussion was that we had a responsibility not to propagate defamation about our own employees.

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No, but I'm just asking you: did you tell the cabinet or point out to the cabinet, "Look, one possible solution to this would simply be let's hang onto these documents. If any of the staff are sued, they have nothing to worry about because pursuant to the policy from 1992 the government will cover their costs"?---No, I didn't and the reason that I didn't was because the tenor of the discussion was not specifically about, "Let's avoid anybody being sued." It was basically about, "Would it be right for a government in the circumstances that we're in to propagate defamation about our own employees"?"

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So was the option of just cabinet retaining the material in the cabinet office ever considered as an alternative to destruction?---The alternatives that were considered were the options. In all of this the overarching fact in the minds of the cabinet was Crown Law advice and so when we asked for options, we expected that those options would be vetted by Crown Law. We didn't sit there trying to invent the options ourselves. We had experts that we sought to have do that work for us so that we would be more properly guided.

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COMMISSIONER: Storing the documents in a cupboard in the department wouldn't be propagating defamation, would it? ---No, but it carried it with the constant risk of accidental or forced disclosure of those documents.

MR COPLEY: What do you mean by forced disclosure?---One of the things would have been after the introduction of freedom of information. We didn't know what the provisions of the freedom of information bill that I was planning at that stage were. We'd only been there for eight weeks at the time of the first cabinet submission, but there would be a constant possibility of disclosure. You couldn't sit on this forever.

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COMMISSIONER: Secretly you mean?---You couldn't keep it secret. You couldn't keep what was in it secret forever and - - -

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So whether it needed the protection of permanent secrecy or not would depend what was in it, wouldn't it?---Yes, sir.

And did anybody in the cabinet ever bother to find out what actually was in it?---When she was introducing the cabinet submission, Anne Warner said that she had received advice to the effect that conceivably if she looked at it or if people in her department looked at and by implication if

23/4/13

WELLS, D.M. XN

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cabinet looked at it, they would be publishing defamation or otherwise becoming a party in some way, however remotely, to that defamation. We were aware that we were not an investigative body. That's not what cabinet is there to do. Cabinet is an executive body, not an investigative one. It was certainly not our role to look at it.

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But you had been told what was in it in a general sense by Ms Warner, that is, it was scuttlebutt and hearsay, isn't it? Isn't that what you say in your statement?---Yes, that's correct, sir.

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But you knew she hadn't looked at the documents presumably for the reason you have stated?---She had not looked at the documents I recall her saying.

But you say that you particularly as attorney-general and as a minister were mindful that being asked to destroy documents, whether they were public documents by official definition or not, was a serious step, not to be taken lightly. True?---Yes; yes, sir. That's why the cabinet decided to call for an options paper and why it took three cabinet decisions to get to the end result.

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I can see that it was deferred and obviously deliberated on and I take your point about it being an executive body which rather begs the question why this matter was being discussed by cabinet at all. It was hardly a matter of high policy, was it?---The way it was put to us by the minister in cabinet was that she thought it was a matter - she didn't want to keep it on the files of her department because keeping it on the files of her department would amount to a negative proposition that was possibly defamatory on the personal file or referable to the personal file of an employee.

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Okay, but why would she bring that to cabinet? That is just an operational decision that department heads and ministers make all the time?---Because the decision to - she said she didn't want to take that decision by herself. She wanted the advice of cabinet to do that.

And cabinet said, "Okay. Well, yeah, that's the sort of work we do. Yeah, we'll give you that advice," did it? ---That's one way of putting it, commissioner. What cabinet said was, "There may be further options here. Let's look at those options," and when those options were considered and all discarded except for the original one which was essentially the default position, they then went to the third cabinet submission. So, yes, what you say is correct but it was a more careful process.

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Yes, I'm sure it was, but you as the attorney-general, wouldn't you say to your cabinet colleagues, "Listen, you know, this isn't the sort of thing that we as executive government normally do. This is an operational matter for the minister and the departmental head. It's not really something we need to be bothering ourselves about. We've got FOI legislation to be thinking about and other more important matters, plus it's risky"---As I indicated, there were some challenging remarks made in the cabinet by some ministers to the effect that it would have been convenient if it hadn't come to cabinet, let this cup pass from us, sort of thing.

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Yes?---On the other hand, it was a new government. All the ministers were new. Nobody was as sure-footed as they would have been at a later time and it might have been that fact that caused Anne Warner to bring it to cabinet or alternatively it might have been that she had received advice, but I don't know which of these it was.

But that's from her point of view. I'm thinking more from cabinet's point of view. Are you saying it was inexperience on her part and the cabinet's part that they considered something that really wasn't normally within their area of concern?---Not necessarily, and I don't know whether to agree to the proposition that it would not normally be within the area of the cabinet's concern. We had been out of office for 32 years. We did not know what was normally within the area of a cabinet's concern. What we knew was that a minister had a problem, that an inquiry that had been established by her predecessor had been pulled up because the magistrate who was running that inquiry had decided that he was in circumstances where his inquiry might have been impugned and consequently she wanted to bring it to cabinet. There is a doctrine of cabinet solidarity. If a minister has a difficulty that they think they need to consult with their colleagues about, then their colleagues consult with them. That was how it was with that completely new government that we were.

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Okay, but that completely new government had an attorney-general. That was you. How long had - were you admitted as a practitioner back then?---No, sir, I was an academic at that time. All the ministers knew that I was an academic prior to going into parliament.

Right, but you'd been in opposition for 32 years. In that time did you sort of read up on the role of the attorney-general in cabinet just in case?---Yes, sir. There is a book which is given to all first-term attorney-generals in their first week. It's called the Law Officers of the Crown. It explains what the functions of the attorney-general are. I think that in that book there will be a number of propositions. One is that in his role

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as first law officer the attorney-general does not take the instructions from cabinet when exercising that particular role. He does not take that role into cabinet with him. He does not go into cabinet as the cabinet's legal adviser. The - - - 1

Can I just pull you up there? You're sure that that's in that booklet, that one, that you don't go in there as a legal adviser to cabinet?---Sorry, I stand corrected. That proposition is not. The Law Officers of the Crown I think is an English book and the situation would be different, but the previous propositions are in that. There are other conventions which are explained to a first-term attorney-general. 10

So just to understand it, what is in the booklet you were given is the contrary to what you said; that is, that the attorney-general is the legal adviser of cabinet?---No.

In the UK, which is the book that you had?---In the UK, yes.

Yes, and the book you had was - - -?---It may have said - I don't remember that particular passage. The bit that I remember is that the first law officer role does not go into cabinet, nor does the attorney-general take instruction in respect of any of the discretions he exercises in the legal system. 20

Yes?---In Australia, as I understand the convention, commissioner, and I believe it remains true today - - -

MR COPLEY: So when the attorney-general decides whether he will appeal against a sentence he doesn't take instructions from the premier?---That's correct. 30

And you didn't?---Never.

Okay, go on.

COMMISSIONER: The Australian convention, you were saying? ---As I understand it.

Is?---The crown solicitor provides the legal advice. In the United Kingdom the arrangement used to be that the attorney-general was not elected. If he then gave - purported to give legal advice to cabinet he would not have the kind of conflict of interest the elected attorney-general would have in Australia. There's a well known legal saying, somebody who is his own lawyer has got a fool for - - - 40

I wouldn't go there, Mr Wells. You're representing yourself here?---I'm just a witness, commissioner. I'm just a witness.

Well, look, let's take the Australian convention. We know that conventions can often be by their very nature - it's a bit like a golf swing, you know, unless you get corrected on the way through, how you start is how you finish. That's the same with conventions. We come in believing that something is a convention, nobody ever goes behind it and sometimes the misunderstanding of convention becomes entrenched, like misspoken becomes part of the language, but Mr Dreyfus is appearing in the International Court of Justice as the attorney-general of Australia at the moment in person?---Yes. There's nothing to stop an attorney-general from appearing in court.

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On behalf of the body politic?---No, there's no convention that says that can't be done.

So why would there be a convention that says there's a conflict of interest for the attorney-general to advise cabinet; that is, a body, an executive body consisting of his own parliamentary colleagues?---He can think about it either as a matter of law or as a matter of pragmatic politics. If thinking of it as a matter of pragmatic politics an attorney-general were to sit in cabinet and purport to advise his colleagues, they would all know that he was not disinterested in the result. He was an elected attorney-general in Australia. He's a politician, he's got an interest, he's got a position in cabinet the same as everybody else. If you think of it from a professional point of view, a legal practitioner who was a member of cabinet would feel that they should indicate that they had a conflict.

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But, Mr Wells, Garfield Barwick was the attorney-general of New South Wales. Do you think he sat there and - sat mum in case somebody thought he had a conflict of interest about a legal point? The point of the fact is that if you've got an interest you disclose it and people take your advice with a grain of salt bearing that in mind. It doesn't mean you can't offer it, it just means that it may or may not have the same weight as if you didn't have that interest, whether it was conflicted or not?---I'd certainly agree with you, commissioner. The remarks of all cabinet ministers have the weight that goes with the manner that the particular cabinet minister has. If they're known to have a background in a certain area then they're listened to, however that does not alter the proposition that when cabinet acts it acts on the basis of legal advice coming out of the Crown Solicitor's Office. The crown solicitor is the source of the government's legal advice. I am not aware of any case where the government ever acted contrary to the advice of the crown solicitor. That's how it is. The expert advice, the unbiased advice, is regarded as that which comes out of the government's law firm, the crown law office.

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So you wouldn't get a second opinion?---You would not purport to be giving a second opinion. 1

MR COPLEY: In this particular case the crown solicitor, as far as the cabinet submission reveals, simply advised that there was no legal impediment to the acting director-general destroying material, didn't he?---I suspect it actually went further at some point, but yes, we understood - and this was the overarching fact in front of us all, that it was - there was no legal impediment whatever, of any kind, to destroying the documents. 10

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Yes. And when someone says that, "Oh, this can be done in law," doesn't mean that it must be done in law, does it? 1

COMMISSIONER: Or should be?---No. No. I'm not aware of whether the Crown Law advice went further. I have the impression that it went further, saying - - -

MR COPLEY: You actually were provided with a copy of it before the cabinet meeting, weren't you?---Yes.

You caused steps to be taken to ensure that you were fully briefed, didn't you?---Yes. 10

On 8 February 1990 your director-general, B.A. Stewart, wrote to the crown solicitor and asked for copies of all relevant advices that the crown solicitor had provided to Ms Matchett to be given to the director-general by 3 o'clock that day, didn't he?---Yes.

And your Director-general Stewart said that that was in order that the honourable the minister, meaning you, could be fully briefed?---Yes.

Before the meeting of cabinet - - -?---Yes. 20

- - - on 12 February?---Yes.

Now, I suggest to you that Mr Stewart must have taken that step because you and/or he realised that the issue that was being placed before the cabinet was on one level very clearly a legal issue?---The best way to answer that question is he was aware that it was an issue with legal ramifications and - - -

And you were the attorney-general?---And he thought that I should understand it. 30

And, see, the difference between this case, for example, and one involving a submission from the director or the Department of Primary Industries about an issue to do with, for example, stock permits or something of that nature, was that the advice that was being presented in the cabinet submission was being said to have come from your department, wasn't it?---You would expect in certain circumstances that a cabinet submission about the Stock Act would have legal ramifications and in those circumstances there would be advice from the crown solicitor. 40

But prima facie evidence concerning the movement of stock and the Stock Act, unless the submission said, "We have obtained advice from the Crown Solicitor's Office," wouldn't have been a matter that would have excited the interest of the attorney-general, would it?---The way it worked was that any matter in respect of which the minister's department - whoever the minister was - had an

interest or had had any input, the minister was briefed as to what that input was. So if Crown Law had given an advice in respect of a matter and that matter was going to cabinet and I would usually be advised that Crown Law had advised in respect of that matter. If it was sufficiently important then on a Monday morning before cabinet I'd be told about it by the appropriate departmental officer. So there was usually a meeting - - -

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But let's not deal in the abstract, let's deal in the concrete. In this particular case on 8 February - so four days before the cabinet meeting on Monday, 12 February - your director-general wrote to the crown solicitor and said, "Cabinet is going to consider the appointment of Mr Heiner on Monday and is going to consider his investigation and report concerning the John Oxley Centre, and it would appear that advice had been provided to the acting director-general" - meaning Matchett - "by you" - meaning O'Shea. And it said, "In order that the honourable minister can be fully briefed for this meeting of cabinet I" - meaning Stewart - "would be appreciative if you would ensure that all copies of all relevant advices are provided to me by 3 pm on the date." So in the concrete circumstances of this particular case your director-general actively pursued the crown solicitor to be provided with copies of all relevant advices by 3 pm on 8 February, didn't he?---Yes, that's correct.

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Right. And those advices were provided to you before cabinet, weren't they?---Yes.

Well before cabinet, not on Sunday in the evening or Monday morning, but well before?---I can't give any evidence on that, I don't remember that, I'm sorry.

All right. Well, we'll just have a look at them. First of all we'll just get you to have a look at exhibit 143. Now, this is a letter that Mr O'Shea wrote to Mr Stewart, your director-general on 8 February 1990. Have you seen this letter before?---Can you give me a moment, please?

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Sure?---I believe I have. I can't say for certain.

Well - - -?---But it reflects an understanding that I had when I went into government.

Well, certainly, because the cabinet submission doesn't tell you what Mr Heiner's personal views about the matter were, but this exhibit 143 reflects something that you said a little earlier in your evidence, that - if you look on page 2 in the fifth paragraph down commencing, "On 19 January 1990," it said

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Ms Matchett met with Mr Heiner, who indicated in writing he wouldn't continue further until he had received written confirmation that he is appointment and authority to act were valid.

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So that may well have been the source of your knowledge before going into cabinet, that Mr Heiner wasn't too keen to proceed until his position was cleared up?---I might have known that before Anne Warner said, yes.

Yes. And you would have known, if you read this letter to Mr Stewart, that the crown solicitor had advised that Mr Heiner's appointment was quite a lawful?---Yes.

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It was quite a valid appointment. There was nothing unlawful about it, was there?---No. I'm not sure that anybody suggested that in the cabinet.

COMMISSIONER: Sorry, not sure that they suggested that there was anything wrong with its constitution, or that - - -?---No, the briefing that we got from the minister indicated that Mr Heiner felt that his inquiry could be impugned by virtue of the fact that he didn't have any protections that are associated with the Commissions of Inquiry Act.

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He was the one who was concerned about that, nobody else was. I mean, looking at the documents, he said, "Oh, what about me?" And the advice from the Crown Law was, "Well, it's a fine. It was properly constituted. As long as you did what you were asked to do, that is to look at the management of the John Oxley Centre and didn't go off on a folly of your own asking other questions that might give rise to some concerns." See, there are two things about the Heiner inquiry; one is was it properly constituted, and all the legal advice it was, so for people to refer to it as you did, as incompetently planned or botched, is clearly wrong, isn't it? In 2013 we know - in 2013 when you did your statement - that the Heiner inquiry wasn't improperly established, incompetently planned or botched, don't you? ---Commissioner, may I suggest however you phrase it, it would nevertheless have been preferable if they had imported the relevant provisions of the Commissions of Inquiry Act in order to provide him with protection so that he was not placed in the invidious situation that he was finally placed in. The proposition - and you might think that it is too flamboyantly put - that the inquiry was incompetently planned, that's referable to the fact that what that means - the cash value of the proposition that it was incompetently planned is that it did not import any of the provisions of the Commissions of Inquiry Act and left Mr Heiner without any protection for defamatory allegations of misconduct that he apparently heard.

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Well, I'll tell you what, I took it to be a political point-score, really, because you say at paragraph 16:

23/4/13

WELLS, D.M. XN

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The bitter irony that after years of mocking the previous government shredding documents and while I was preparing freedom of information legislation to make governments more accountable, we were being asked to remedy the effects of an incompetently planned inquiry of the previous National Party government by doing some more shredding for them.

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That's not what you were being asked at all, Mr Wells, and you would have known that when you did this statement this week. Why did you say that?---That's what I said in cabinet. That's what I believed.

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23/4/13

WELLS, D.M. XN

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Did you believe that when you said it in cabinet?---Yes. 1

How? On what basis - - -?---I said - I'm sorry, sir.

On what basis did you believe that?---What the proposition meant was that the inquiry should have been established with reference to the relevant provisions of the Commissions of Inquiry Act in order to provide Mr Heiner with protection.

Why did he need protection for an inquiry into the management of a youth centre that was set up by the department, not by any politician or minister? Tell me that?---Because it was known to be a place where there was industrial disputation of a bitter kind. 10

If a departmental officer investigates an industrial dispute at a centre who's not a former magistrate he under the policy has protection for acting in good faith and any legal action that might be taken against him or her?---Yes.

Right. So why would Mr Heiner just not need that? Why would he need all the protections that I have got, for example, under the Commissions of Inquiry Act?---It would be a courtesy at the very least, if not a necessity, if you were employing a former judicial officer to do an investigation for you to give them the protections of that office. He obviously thought that he had them and he didn't have them. 20

You know if you have got them. They give them to you. There's no mistake. You read about it in an Order in Council so he would have known he didn't have them really and then he conducted his inquiry anyway without them?---I could only speculate on that. 30

Of course, but if you're going to go on probabilities in terms of speculation, the most likely answer would be he clearly knew he didn't have them. He didn't think about it. Nobody else did because they didn't think he needed them. What happened? Something happened in the course of what he did that gave rise to the possibility of legal action against him and it may have had nothing to do with what he was asked to do. He might have gone off the rails?---I could give no evidence on that, commissioner. All that was before us was that a respected former magistrate believed that he was in a situation that his inquiry could have been impugned and whatever any of us said by way of criticism of the previous government, whether it might be judged to be flamboyant or not amounted really to this: that the previous government had set up this inquiry with a former judicial officer without providing him with the protections that would have enabled him to continue the inquiry in the circumstances that he actually found himself. 40

Actually that's not true either on the evidence because they were abandoning his inquiry; not because he didn't have protection but because of the way he was conducting it?---I have no evidence about that, nor did cabinet at the time. What cabinet knew was that Mr Heiner, a former magistrate, believed that he was in a situation where his inquiry could be impugned and he didn't wish to continue in those circumstances, nor to report on the facts that he had gleaned in the course of those circumstances.

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All right. Two questions then: indemnify him or not, just like he would be if he was departmental officer. That's one issue. You dealt with that. You indemnified him straightaway first cabinet meeting. That was finished. The next question is what to do with the documents that he had gathered. That was the next issue, wasn't it? That's the one that was deferred?---Yes, sir.

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Your advice was that there was no impediment to you destroying it initially on the wrong premise that it wasn't a public record and then that was corrected by your legal adviser, the crown solicitor, to being it is a public record but there's still no impediment if you get the permission of the archivist. That's how it went, isn't it?---Yes, sir.

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Could I take you to the document that you would have had in front of you at cabinet and would have read before you went into cabinet, exhibit 151, please, Mr Wells? Now, I'm going to read this to you in the context of things as they emerged one at a time. The government accepted full and sole responsibility for legal costs that Mr Heiner might incur in defending a claim arising out of his investigation, right. Did that?---Yes.

Now, the relationship between you and him just changed. He now became a person who you would indemnify for damages and legal costs if and when. Right?---Yes.

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You therefore, as the government, had an interest in whether or not he was going to be held liable or ordered to pay any damages because if he was, you were going to have to foot the bill. Right?---Yes.

Yes?---Though I think the cabinet submission says there's no financial liability. Obviously Treasury did not take that as a very significant matter.

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No, but let's stick with the matter of principle for the moment?---As a matter of law, yes.

Who knows what the future holds? You're making a decision based on what might happen in the future, aren't you?
---Yes.

Legal action and the liability of the crown for that legal action?---Yes; yes, to an extent. What I would like to emphasise, if I may, is that the debate about the matter in cabinet was about what the right thing was to do by our employees, was about what responsibilities we had; not legal responsibilities. Cabinet believed that those were dealt with by the crown solicitor's advice. It was about what was the proper thing to do with a box of documents that we had been told contained defamation or might contain defamation.

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Okay?---It was about public administration rather than about law.

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Which begs the question why public administration issues are being dealt with by the executive government, but go on?---Because very often policy with respect to public administration is dealt with by executive government.

But you weren't being asked to formulate a policy as to whether or not we should destroy documents that are potentially defamatory to someone. Were you going to implement a policy of that sort?---It would have been a precedent. It would have been a precedent that would be taken into account, but you would always act on Crown Law advice.

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Yes, Crown Law advice says there's nothing legally wrong in doing it so you have to decide as a matter of policy were you going to do it and, bearing in mind if you did it for Heiner, when were you going to be asked to do it next?---It would have been a precedent and it would have been one that would be referred to in the future but, you know, it's not likely it would be binding like a court decision or something like that.

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But you're buying yourself a problem as cabinet, aren't you? You're inviting other people to bring forward similar requests in the future because you have just made a policy and you have got yourselves involved into that issue of whether you destroy documents or not which is already governed by the law?---And we were very well aware of that and that's why it took three cabinet decisions to get to that point.

Okay; and I take your point about what your focus was. I am mindful of that and I will come back to that, but what I'm looking at now is the contextual facts; one contextual fact, that is, the environment in which you're making this decision is you have just indemnified a man with state money. The next thing you have to decide is whether you're going to destroy the very evidence that might give rise to that man's liability which you have just indemnified him for, isn't it?---I don't think anybody ever thought of it like that.

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No, but think about it now though. I'm looking at the facts, not what people thought about?---Yes, well, are you suggesting that it would be inappropriate for us to make the decision to do that because it might give rise - - -

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No, I'm not suggesting anything. What I'm saying to you is you have indemnified Mr Heiner, then the next thing your submission asks you to consider is whether you should destroy the very evidence upon which his liability in a court, if it ever happened, would be decided.

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Did you not think, did not anyone think, that there was a bit of a conflict of interest there in you being the guarantor of this man's legal liability and the controller of the very documents that might contain evidence against him of defamation of someone?---If we had thought about that and if anybody had articulated it - and I don't know whether we did or not; I don't recall, we would have said, "Well, this is not a matter for us. This is a legal question on which we must take advice from the crown solicitor."

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All right, so did you ever ask the crown solicitor, "Bearing in mind we've just indemnified Mr Heiner, should we destroy incriminating evidence against him as a matter of law, political morality," any of those things?---There was no additional request to the crown solicitor of precisely the kind that you have asked. There was - - -

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So that suggests that no-one thought about it?---Pardon?

That suggests that nobody thought about those two colliding facts, the clash of the two issues?---It's pretty important for me, I think, to emphasise that when you get cabinet it's policy issues rather than legal issues which exercise you, and the reason for that is because you go in there with Crown Law advice. A cabinet submission is not supposed to get into the cabinet bag at all if there's Crown Law advice saying, "You can't do this."

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I know, and I'm dealing with policy. I'm saying - given these two facts, you've indemnified Mr Heiner and you're being asked to destroy evidence that might be used against him by somebody, as a matter of policy what was cabinet's policy about that? Yes, you do destroy documents in those circumstances to protect an indemnified witness potentially, or no, you don't, you keep them available just in case some court later down the track wants them to work out where liability is?---Well, then you'd keep everything.

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Well, you do, normally?---Because any document is capable of becoming - - -

That's why we've got an archive?---Even archives have their limit. I mean the amount of material that is surplus to - - -

Okay, well, that's a consideration in your policies, but did you discuss those sort of considerations in the context of the Heiner debate? Did somebody say, "Yeah, we can get rid of that because, well, nobody has actually sued yet, and in any event, the archives are already full. This stuff is only scuttlebutt. It could be defamatory scuttlebutt and we've just indemnified somebody against any legal action, including defamation, but let's destroy it anyway"?---That would be a caricature of the cabinet

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debate. The substance of what you're saying reflects some of the issues that were made. We were advised in the first cabinet meeting that there was no legal action. That was important, an important policy consideration, was it?---No, because the overarching fact was that the crown solicitor had said that there was no legal impediment to destroying it, so we believed that there was no legal process, judicial or otherwise, and we believed implicitly that there was no legal process, judicial or otherwise, that required the documents.

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Would that have made a difference if there was to your policy-making?---Yes, because the crown solicitor had advised that his advice would be different were it otherwise.

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If there was an action on foot?---Yes. He advised that.

MR COPLEY: You knew that. You knew that not from the cabinet submission, though, didn't you?---Yes.

You knew that because you actually received a copy of the crown solicitor's advice of 23 January 1990, didn't you? ---Yes.

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Where it said, "This advice is predicated on the fact that no legal action has been commenced which requires production of the documents"?---Yes.

COMMISSIONER: So did that become a relevant fact for cabinet? Did you advise them of that fact in the course of the discussion, do you remember?---It was not my role at all to advise in any legal - - -

Inform, sorry. Did you inform cabinet of that predication? ---It was written in front of them. They were all supposed to have read it.

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But it wasn't written in front of them. That's the point Mr Copley just made. You had it because you got the advice?---Commissioner, it was written in the - - -

Could you show me in exhibit 151 where that is?---I can't remember. I think it's towards the end.

The crown solicitor advises there's no legal impediment to this course of action. Yes, I see that, but I'm asking whether you informed cabinet because of your extra knowledge or whether cabinet was otherwise informed that no action, legal action, had actually been taken as at 5 February 1990?---The section that you read out was not the one that I had in mind. It's on page 6, paragraph 7. "This advice does not apply to material removed from official files, which should be returned, nor would it apply in the event of legal action requiring production of

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the material being commenced. To date no such action has been initiated."

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Okay, so just in the - now that we're at that paragraph, see in the preceding sentence he says, "This advice would not apply in the event of legal action requiring production of the material being commenced," right. So if it was commenced there would be a legal impediment. Is that what you read that to be?---That's correct.

But because there was no action currently been initiated there was technically no legal impediment. The legal impediment would only come if action was taken, is that right, in the future?---Yes. It was very explicit.

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Yes, all right. Can I then go back to the objective on page 2 of exhibit 151? You see under the heading Objective of Submission?---I'm sorry, which day are we doing? 12 February?

No, sorry, the 5th still.

MR COPLEY: He calls it the 12th because the cover sheet is the 12th.

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COMMISSIONER: I beg your pardon.

MR COPLEY: That's attached to exhibit 151.

COMMISSIONER: Exhibit 151.

MR COPLEY: As he's looking at a document with 12 February on it, the witness is looking at the right document, because if he goes past page 1 he will see that the other documents were apparently signed on 5 February.

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COMMISSIONER: Yes, so page 2, Mr Wells?---Yes.

You've got it?---Procedures and issues.

No, that - - -

MR COPLEY: The next page, Mr Wells?---I'm sorry.

COMMISSIONER: Page 3. My fault. I beg your pardon, I misled you. You see that you've got the extension of the policy to Mr Heiner. Right?---Yes.

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That's not a problem. That was pretty easy, just extend it to him. All over. He's indemnified just like everybody else. Then it goes into the next paragraph, "Destruction of material gathered by Mr Heiner in the course of his investigation would reduce risk of legal action." What did that mean to you?---I don't know, but the very next line is that the crown solicitor advises that there is no impediment to it.

23/4/13

WELLS, D.M. XN

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No, I know that says that, but going back to my question, if you wouldn't mind, when you read destruction would reduce the risk of legal action and provide protection for all involved in the investigation, what did that mean to you?---I did not speculate. It might conceivably have meant that somebody would have wanted the documents or it might conceivably have meant that somebody wanted to extract apologies from somebody.

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Or if somebody wanted to sue the man you'd just indemnified for defamation it would be hard for them to do that if the documents didn't exist anymore. Is that one interpretation open?---It was not something that cabinet focused on and if it were - it was not something that cabinet focused on.

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Did you focus on it?---No.

Did you read that?---Yes.

You didn't focus on it. Did you give it - did you not notice it at all?---I believed that whatever was proposed there was legally okay because it had been vetted by the crown solicitor.

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See that heading up the top, Objective of Submission, what does that mean to a cabinet minister in a submission?---It's the kind of decision they're looking for.

Yes, and what they want to achieve by what they're suggesting, doesn't it? "Objective" means what you want to achieve?---Yes.

Was it - - -?---The achievement is the decision at the end of cabinet.

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Yes, but was one of the objectives to destroy the material so that the risk of legal action against Mr Heiner would be reduced?---It was not something that was foremost in the mind of cabinet ministers. 1

Was it a goal, foremost or not?---I doubt it. Almost the entire focus was: what does sound policy require of us in these circumstances? Should be we keeping on files of government - referable by certain people in certain circumstances and everybody after freedom of information - defamatory allegations that are untested about our own employees? The thought was actually outrageous. 10

Well, this is in the context of the Fitzgerald inquiry and all its files about people being kept, wasn't it?---Quite so. And that's why we thought that the legal advice that we were getting from crown solicitors would be very, very careful indeed.

So it wasn't a goal to destroy these documents to inhibit legal action, but it was an effect. Did you understand that from the submission; there was a practical effect of destroying them?---I don't necessarily accept that that would have been the effect of destroying them, no. And may I say why? 20

Yes, of course?---Because all the people who had said what they had said, they were still in existence, they could have been called if there had been a legal action. It was not a necessary effect of it at all.

So was that proposition in the submission challenged in order to make the decision to destroy?---It may - - -

Because it didn't have that effect that was suggested, in your view wrongly, in the submission?---In my statement, Commissioner, I refer to some remarks that were made by a minister - and it's 23 years ago, I remember some of this stuff. In this paragraph I'm careful to point out what part but I remember and what I don't, but if I could refer to paragraph - - - 30

MR COPLEY: I think you're looking for 15?---So I say in paragraph 15, I say:

My memory of this minister's remark is a little hazy and I may be reporting it as being more precise than it was, but I believe what I said, that cabinet was of the understanding that he saw a difference between destroying evidence and destroying a record of evidence. 40

And he made the point that if you shredded documents she would still have the problem in the sense that the people there would still be in a position where they could

continue to conduct their industrial disputation and that a personality conflict. And so that was said in cabinet. As I say, my memory of this bit is more hazy than my memory of the rest, but you asked be the question and it is in there.

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COMMISSIONER: And does that make sense to you, that observation by the minister?---It was something that ministers took on board. Are you asking me would argue that in court?

No, I'm saying did you think that was a fair enough observation to make, that, "Yes, the witnesses are still available, so why do you need the bits of paper that Heiner collected"?---It was not something that he was trying to pitch extremely high, but it goes to the question that you asked.

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Right. You see where it says Results of Consultation on that page, "No specific objections have been raised to the proposed course of action." Did you take that to mean that no specific objections have been made by the people who had been consulted, which included the State Service Union and the Professional Officers Association?---I expect so.

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Yes. Now, what you would have known is that there were two camps. Do you have a dispute you need two sides. Right?---Yes.

So what might have been in the scuttlebutt in the box that nobody looked at would have been information that might have been defamatory against one employee and another? ---Yes.

And one might have wanted that kept to take some action against the defamer, and the defamer might have had a greater interest, as things turned out, to having it destroyed to protect himself against being sued for defamation. Was that the sort of thing that you were thinking about in cabinet?---Yes.

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Because you didn't want employees suing each other. Is that right?---We didn't want to be part of it. Once you put it on the file of any government department you become a part of it. Arguably if you put it on the file of a government department you add value to it, you add credibility to it, you add plausibility to it, you add gravitas to the allegation by putting it on the file of the government department. We didn't want to do that.

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Okay.

MR COPLEY: No, but - so why didn't you, for example, just say, "We'll just leave it here in the cabinet office for the moment and see where the dust - see where it all

settles in three or four or six months' time"?---That was one of the - - - 1

It was one option, wasn't it, in the second meeting?---Yes. And the problem with that option is that it was not a cabinet document and therefore it would not attract the doctrine of cabinet secrecy.

Yes, but let's forget about all these highfalutin legal notions just for a sec, though. If you just kept it in the cabinet office, even though it mightn't attract cabinet privilege, to get it out of the cabinet office presumably somebody would have to have recourse to law to obtain it, wouldn't they? They'd bring an action in the court and that make an application for discovery or something, wouldn't they, of the cabinet office?---We've just been through a very long period of time when all sorts of things were appearing, documents were being lifted and produced in all sorts of other places and it had been going on for some time - - - 10

What do you - - -?--- - - - same place in - - -

What do you mean to suggest by that? Are you meaning to suggest a commission of inquiry might have come along and all of a sudden demanded it?---No, I mean it could have been leaked. These documents could have been leaked at any time. 20

Why did you think that?---Because we'd just been through a long period where other documents had been leaked.

But by this time they're in the cabinet office and the man in charge of the cabinet office was a person who had been brought in the change of government, wasn't he?---Yes. 30

So it's not a sensible answer to say that you thought these things were susceptible to being leaked?---There would be very, very many people in - there would be very, very many people that would be capable of putting their hands on such a document.

Even kept in the Cabinet Secretariat?---When I was in opposition I tabled documents that - photocopies of documents that were in secure filing cabinets in ministerial offices.

Sorry, what are you saying to me, that you tabled information that you knew had been stolen or unlawfully obtained?---In opposition I tabled cheques - photocopies of cheques - - - 40

C-h-e-q-u-e-s's?---Yes, made out to the National Party on the cheque books of government departments.

Yes?---Money that had been stolen from departments and given to a political party or to - - - 1

COMMISSIONER: Sorry, what's the point of this?---The lack of security of documents.

MR COPLEY: To explain how things can't be kept secret? ---Counsel suggested to me that was not a sensible answer to say that documents could be leaked.

COMMISSIONER: Well, you say they could be. The details of what you leaked or had leaked to you don't really interest me. But let's say they could have been leaked, that's always a risk with every document, with every sensitive document, your just telling me, really, aren't you? You're making the point that you can never 100 per cent secure any document. It poses this question, though, was what Mr Heiner collected of such grave importance that protecting it from the possibility of leak, even with all your best endeavours to protect it, was it with so much trouble? It wasn't the plan of a submarine or anything, was it?---We didn't know at that time that it was going to be so much trouble. We thought that it was a bit of trouble but we thought that "This is something that we can do but it's not the sort of thing that we want to do because we're planning to be an open and accountable government", but we're stuck with this problem where a respected magistrate believed that these were documents that he wasn't prepared to be in possession of. We were inheriting his problems. 20

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But wouldn't you as cabinet only do something if there was a cost benefit? What's the benefit of doing it? What's the cost of doing it? The benefit is to get rid of some scuttlebutt. The cost is to create potential suspicion and grievance by the people. See, you had two sides. You had those who would want it destroyed because of what they said against somebody else and those who want access to it to use to sue the people who defamed them. Destroying them was going to upset one of those sides, wasn't it?---Yes, that's true. 1

And you favoured one side over the other in deciding to destroy them, in effect, didn't you?---Yes, because we believed that it was improper for us to keep untested defamation of allegations of misconduct on the files of government departments. 10

But you didn't know what was in them?---No, but we knew that - we believed that it was allegations of misconduct by one employee made against another, misconduct which did not amount to criminal behaviour and which was made without any privilege.

How could you accept this proposition on the bottom of page 3 under the heading "General or Sectional Support": 20

It is expected that the course of action, that is, destruction, will be acceptable to the majority of the parties involved.

How could you accept the validity of that proposition without knowing what was in the documents and who the parties involved were?---It was an expectation the minister had that was being conveyed to us. We had no reason for doubting or controverting the minister's judgment. 30

Or even questioning it?---There was no basis on which you could question it. There was no basis - - -

But there no basis for asserting it, was there? What was the basis for asserting it? Do you know?---No, that's not something that I will ever know. It's a standard formula of words that's used in cabinet submissions relating to consultation.

Presumably you put something in cabinet submission because it's true and you want cabinet to act on the faith of it? ---We had no doubt that we believed - we had no doubt that the minister believed that it was true. 40

But you wanted it to be more than true. You want it to be reliable too, don't you, that is, you want more than her to believe it's true? You want it to be actually true?---In executive government you act on the best information that you've got. We were not in a position where we could get better information than that.

I'm asking you these questions and you're giving me these answers in the context of something you said in your statement that what you were embarking upon here, what you were being asked to do, was something very serious, very unusual and you would have to be very careful before you did it?---Yes.

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I must say the level of consideration given to all the implications seems to have been less than what you might have expected in the circumstances that you were saying was such a risky precedent to set. The questions that seemed obvious didn't seem to have been asked?---This was a pretty standard cabinet day in the sense that there would have been more than 20 cabinet submissions. The nature of executive government at cabinet level is that many decisions have to be made and sometime they have to be made very quickly. Time that's available to ministers is very, very short indeed.

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MR COPLEY: But this was a matter that you had inside knowledge about, didn't you, because you had actually read the advice of the crown solicitor?---Yes, I expect that I had; yes.

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Yes, well, I will show it to you to see if I can get you to be definitive about whether you had read it. Look at exhibit 129, please.

COMMISSIONER: It is also in the context it was such a serious decision it was deferred three times - twice?---I'm sorry, commissioner?

It was such an important decision it was deferred twice. That's part of the context. We're looking at - - -?---I'm sorry, I missed the word at the end. It's such an important decision that what?

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It was deferred twice?---Yes, I'm sorry.

MR COPLEY: So if you could just look at exhibit 129, I just want to see whether or not you're prepared to concede that you actually saw and read that advice before the cabinet meeting?---I believe that I did.

Well, you would have seen - see, this comes to the question of propriety. Forget about lawfulness. This is all aimed at considering and asking you to comment upon propriety or appropriateness of conduct. You'll see that in the last paragraph of his letter Mr O'Shea said:

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Enclosed also -

now, you may not have got this document but at least you would have known of it -

is a copy of the cabinet policy statement concerned indemnities for claims against officers. This may be of some assistance in Mr Heiner's situation.

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Now, as a lawyer, did you, when you read that, say to Stewart, the director-general, "Get me a copy of this cabinet policy about indemnification for claims against officers, please. I want to have a look at that"?---Could you give me a moment? I don't believe I did.

If you did, you would have seen that the policy would have been apt to provide protection for members of staff at the centre to protect them from, for example, the thing that Mr O'Shea obliquely referred to on the previous page under the phrase "or the treatment of any staff at the centre" and which he more explicitly referred to earlier on the page about people not being immune from an action for defamation. If indeed you wanted cabinet to be very sure that there was no better way of handling the matter, then I would suggest to you it would have been incumbent upon you, as a lawyer who had had the advantage of reading these a few days before the meeting, to say to the cabinet, "Hang on. Before you destroy these things there is a government policy that will cover - we've covered Heiner. The very policy we're extended to Heiner already covers and protects the staff. In that context, do we need to destroy? Let us go back to the crown solicitor and say, 'You alluded to this policy in the context of protecting Mr Heiner. You didn't actually consider the policy in the context of it being satisfactory to protect the staff compared to the option of destruction. Would you, Mr O'Shea, give us a further opinion about that?' I could do that for you, ladies and gentlemen, because this Mr O'Shea works for me. Let us do that. Let me go and get an advice from Mr O'Shea along those lines"?---I understand what you're saying.

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Did it occur to you?---I've been racking my brains since you summonsed me to try to remember this stuff. Now, I can't - I'd like to be able to give you evidence that on that morning Ken O'Shea came and spoke to me.

On which morning though?---On the morning of the cabinet.

Right?---It was usual. It was usual and I think that he did but I can't swear. I just can't retrieve that bit from my memory, but I do have a recollection of the fact that I heard him say as well as showing me documents, "The destruction option is okay. It's okay to go with." I remember him saying that to me very - he was very, very definite.

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He might have been definite about it. Cabinet wasn't so sure because it deferred it a couple of times to get other options, didn't it, and it would have become apparent to

you, I suggest, as the cabinet debate ebbed and flowing
that there were misgivings about destruction and so what
I - - -

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COMMISSIONER: Is that right?

MR COPLEY: Do you accept that proposition that as the
debate went and back forth you discerned there were
misgivings about destruction on 12 February 1990?---Yes, it
was a matter - well, it was a matter of policy
alternatives, none of which were good.

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Right, so did it - what I'm asking you is why didn't it occur to you to say, "Look, by all means get other options, but I'll go back to Ken O'Shea and ask him why the policy that apparently has existed since 1982 that we're going to extend to protect Heiner wouldn't be simply sufficient to protect the staff. I'll go and get further advice on that issue from him on that issue"?---You see, what I'm saying to you is I can't swear to you or give evidence that I didn't do that on that morning. I can't say that because I just don't remember that bit.

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So you're saying - - -?---But I remember asking him a couple of questions about it either that morning or before and being assured. Whether that was one of the questions I don't know.

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Well, that, with respect, tells us nothing, because what you're saying is, "I remember I spoke to Ken O'Shea. I don't remember what I talked to him about. Maybe I did ask him that and I got a certain answer and that might explain why I didn't say something in cabinet?---I tell you nothing because I say that I don't remember. What I do remember is that I spoke to him.

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Yes?---If you want to rule out the - I suggest to you you can't rule out the possibility that such a conversation didn't occur.

No, and you can't - but you can't assert it did?---But I can't assert it, no.

COMMISSIONER: This was your - again, I'm trying to contextualise decision-making. That's all I'm trying to do at this point. You see, you said your focus was on the employees suing each other?---No.

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Wasn't it?---The focus was on the government not doing the right thing - not doing the wrong thing by defaming its own employees or being a party to the defamation of its own employees or keeping dossiers on its own employees. We'd just destroyed the special branch file - the special branch, which keep dossiers on members of the opposition.

MR COPLEY: But there was a procedure. Look, the special branch is a silly analogy, isn't it, because when the special branch was running around spying on people they didn't get notice that, "The special branch has been looking and have made the following observations and is going to make a report to put on a police file about you." Under the Public Service Management and Employment Regulations of 1988 if anything was to go onto a departmental file or record about an officer that was adverse to the officer or reasonably possible of being construed as adverse, the officer had to be given notice of

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it so that he could comment upon it. Now, you knew that, didn't you?---I don't know whether I did or not. We had just got into government.

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Yes, but you were in the parliament when those laws were being passed because it was the Public Service Management and Employment Act of 1988 and the regulations that were made to it were made pursuant to the 1988 statute and you would have known that those regulations accorded a level of procedural fairness to public servants?---I don't know whether I knew that or not.

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COMMISSIONER: Mr Wells, can I just take you back to page 3 of that document 151? Now, just to confirm, you've told me that the focus of cabinet was not being the repository of defamatory material against its own employees, right? That was one of your quandaries?---Yes.

You wanted to solve that problem?---Yes.

Destruction was an option?---Yes.

But of course in destroying you would be helping one set of employees over the other, the two fighting factions?---How would we be helping?

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Well, there would be one - someone would want access to those defamatory statements to use them against - in a legal action and the others wouldn't want them available for use against them in a legal action?---Sure, that's what they'd want, but I'm not sure that we would be helping them.

You would be creating a set of facts that would make it hard for one group to sue another group because the documents would be destroyed that would record exactly what they said and then there wouldn't be any argument in court about who said what, when and to whom. You're a lawyer. What was the best evidence, the recollection of witnesses or the bit of paper that Mr Heiner recorded what they said on that contemporaneously?---That was - of course, that was the best evidence.

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Of course. So what you're really being asked to do is destroy the best evidence of defamation, on the one hand, when you analyse it, isn't it, and you had to work out whether that was in the public good, but that's what you were being asked to do?---We were being asked to destroy something that we did not know was going to be evidence at all.

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But you believed, had been told, that it was defamatory? ---Yes.

Right, may I say, let's accept that basis. If that was your purpose I would have thought I might have seen a

mention of it under the heading of Objective of Submission, but the only thing I can read under that heading is destruction would reduce the risk of litigation and protect all concerned, all involved in the investigation. So protect - destruction, reduce risk, protection. They're the three main words that jump out at me. Nothing mentioned there that, "We would protect our employees from," you know, "the ongoing angst about defamatory action"?---I can't give evidence about how the cabinet submission is drawn up. It speaks for itself. What I said was that the focus of the cabinet debate was about whether the government should be doing one thing or the other, whether - it should not do the wrong thing by its employees.

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Which employees?---Any employee. We didn't know what the sites were. We didn't know who the personalities were, most of us. Perhaps the minister concerned had some knowledge of it. The rest of us, we were busy, 18 hours a day, getting used to our own departments. We didn't know so much about the details of that territory.

So that's the exact - - -?---So we didn't ask the question of which employees, it was just they were government employees.

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To be Rumsfeldian about it, we know what we don't know, and when you're being asked to make a very serious policy decision, an unprecedented one, perhaps, you would want to know. You wouldn't want to know what you don't know, you'd want to know?---Perhaps we wouldn't want to be partial. From our point of view it didn't matter which party it was, and I don't even know which party it was now.

Mr Wells, how could you accept this proposition in the circumstances that were presenting to you, and that is, destruction will provide protection for all involved. How could it protect all given that there were two sides and there were two factions and there was one employee pitted against the other. How could all their interests be satisfied by the one destruction?---I don't remember that particular section of the cabinet submission being controverted in cabinet, but it may have been.

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But it would be obvious if you had - you know that what the John Oxley investigation was all about. It was one employee whingeing about another one, and you know that the scuttlebutt in the box of Heiner documents was said to contain scuttlebutt and defamatory material presumably by one employee against another?---Yes.

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So how could you meet all their interests by destroying documents that to one would be a weapon, to the other would be a shield?---That seems to be a very sensible point to make and I can't tell you whether it was made in cabinet or

not. I don't remember it, but it's the kind of thing that somebody might have said. 1

Mr Wells, would you like a break at this stage or are you happy to continue?---Whatever is convenient to the inquiry.

I'm okay. I tend to sort of sit on, but I'm not the one in there?---It's okay, Commissioner.

MR COPLEY: In paragraph 9 of your statement you say that Anne Warner said that if the documents stayed in her department they would become part of or be relevant to the personal files of the employees and to keep unsubstantiated scuttlebutt and insults on people's files was intolerably unfair. That's what she said?---Yes. 10

My question for you is did it not occur to anyone to say, "Well, look, you can't just put them on their files, these defamatory statements. The staff who are being criticised will have to be given the opportunity to see the material and provide a response to the material. So to the extent that it's unfair, Ms Warner, the unfairness is ameliorated by the opportunity for the affected staff to be given the right to be heard about the critical comments of them before they are put on the file"?---I can't recall that being said. It may have been, but I can't recall it being said. 20

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Okay. Now, in your statement, can I suggest to you that at paragraph 21 you seem to cast the decision for cabinet as being a choice between whether cabinet was going to publish defamation or destroy the documents. If you want to check that, you can, but I say to you that seems to be the way you cast the question at paragraph 21?---That was how I cast the question in my mind, I believe.

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Right. Why did you cast the question that way, that our choice is: if we keep, we publish; or we destroy? How was keeping the documents tantamount to publishing defamation? ---Because I think I say somewhere in the statement that it carried the constant risk of accidental or forced disclosure of some kind.

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Okay. All right. Now, accidental, we can understand how that might occur; by forced disclosure, you spoke before about the possibility of FOI laws coming in?---Yes.

All right?---We were planning them.

Yes?---It was mentioned in the cabinet meeting.

Yes. Well, being the planners of the FOI laws, you could have drafted laws to ensure that material of this nature wasn't released, couldn't you?---That would be pretty suboptimal planning, to plan legislation in order to cover the particular circumstances that you were in. It would be better to plan it according to general principles.

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Right. And by forced disclosure, do you have in mind any other notion besides it being forced by a subsequent statute passed by your parliament?---I didn't know whether there were procedures under some other act that could have extracted the documents. I didn't know that.

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COMMISSIONER: Litigation procedures would, wouldn't they? ---Yes. I wasn't thinking of litigation when I saw that, I was thinking of, I think, administrative processes.

MR COPLEY: So you used the word "publish" in paragraph 21 as to not necessarily mean an action on the part of the government, but rather simply a consequence of the government keeping the material; the government might effectively ultimately, inadvertently or against its will be forced to release it, thereby publishing. Is that what you mean by "publish"?---I think what you say encapsulates my concern. My concern was that if the government had it on its files anywhere, then it would be adding to the credibility of the allegations therein contained.

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Right. Well now, the police service is a part of the government, isn't it?---Yes. And indeed - - -

No, don't make a speech?---I'm sorry.

23/4/13

WELLS, D.M. XN

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Just answer the question and we'll get through it quicker? 1
---My apologies.

That's all right. Being a part of the government, the police service must from time to time obtain information that is defamatory or critical about a citizen, mustn't it?---Yes.

And that information must somehow or other be retained or kept by the police, mustn't it?---Yes.

So the police service more or less successfully manages to obtain and contain within its department or its buildings information quite critical of all quite adverse to the reputation of people, doesn't it?---Yes. 10

This was no different, really, was it? It was just information that had been acquired in good faith, given over perhaps in good faith, critical of people, and it could have been, I'd suggest to you, quite adequately contained if nowhere else but at the Cabinet Secretariat? ---Sorry, you're saying that able to be contained at the police rather than at the cabinet? 20

No, no, no, at the Cabinet Secretariat, because that was one of the four options in the second submission?---No, I didn't believe it could be kept at the Cabinet Secretariat because - - -

But why?--- - - - it was not a Cabinet document.

Yes. But look, there's no law that says that the Cabinet Secretariat can only keep in its cupboard a cabinet document, is there?---No.

So cabinet, being the supreme body, could say, "Look, Mr Tait, you will keep this here. You will keep it under lock and key. We'll see what unfolds in the next six months so about it"?---For the reasons that I've already given and others, I don't think that that was a good option. 30

Well, can I put this to you for you to consider, that it was a more appropriate or a better option than the option of destroying the material?---I don't believe so.

Okay?---Part of the reason for that was that while I and the other ministers, I think, were aware that there was likely to be exclusion from the freedom of information, cabinet documents that - a cabinet document would have to be a document that was created for cabinet, and this was not a document that was created the cabinet, this was just something that was sent to us. 40

COMMISSIONER: Was the CJC established by this stage?---We 1
were in the process of setting it up at that stage. If we
had known - if it had happened to date you would just give
it to the CJC or the CMC, you just give it to them.

Even in light of recent history?---Yes. Yes, because
that's what it's for. I think I mentioned in my statement
that it was mentioned in cabinet, that we were setting up
the CJC. This was the ideal place for people to take the
kinds of complaints that they were making, complaints of
misconduct, because it was a body that would have a
misconduct division. 10

No, I mean as a replacement for the documents?
---Absolutely, yes. It would have been ideal.

Because that's what they did with the Connolly Ryan
documents, isn't it, that government - - -?
---Notwithstanding that things sometimes go wrong, we were
setting up an institution the purpose of which would have
been to deal with the problem that we had, but we didn't
have it then.

MR COPLEY: Can I suggest to you that - comment on this 20
proposition, that cabinet rather panicked in the
circumstances and overreacted in destroying the documents,
instead of just adopting a more robust approach of saying,
"We'll hang onto these for three or six months and we'll
just see what happens. We've transferred the manager away,
we've got a new manager in there at the centre, that'll
settle it all down and we'll reconsider the fate of these
documents in three or six months, and maybe ultimately we
will return them to the director-general of the department
from where they came."

COMMISSIONER: And don't forget another fact, no one is 30
suing you, let's wait and see if we've got a problem.
Let's not solve a problem we don't yet have.

MR COPLEY: And if indeed anyone did sue in that three or
six months then that would be the crown solicitor's problem
as a legal professional as to whether he released the
documents on demand or whether he said, "No, you're not
entitled to them, you'll have to try and obtain an order
for third-party discovery," or something. Do you think
with the benefit of hindsight you concede that cabinet
panicked, really, and rushed in where it didn't need to
go?---I wouldn't concede that cabinet panicked, but with 40
the benefit of hindsight very many things would have been
done differently. With the benefit of hindsight perhaps
the option that you're now suggesting, hold it for a while
and then give it to the CJC, would have occurred, but - - -

Well, it's not an option I'm now - I might be suggesting
it now, but it was an option that was put to you on
19 February 1990 of holding it, wasn't it?---Yes.

23/4/13

WELLS, D.M. XN

I can show you exhibit 168 if you want it shown to you? 1
---No, you don't. It was one of the options.

Yes, one of four in that document?---Yes. And for the reasons that I've given we did not think that that was a good option. We did not want it to be in the cabinet office. Apart from anything else we were - how shall I say this - we were giving comfort to or we were - I can't think of exactly the right word that I want to say.

Succour?---We didn't want to have it on the files of government anywhere because we didn't think it was 10
appropriate for it to be in existence. It was not something that we wanted the government to propagate or to keep or save.

So it was just - it was your understanding of cabinet's view that leaving aside anything about possible legal actions, leaving or that to one side, this is just improper material for the government of Queensland to hold?---That was, as I understand it - that was my view.

That was your view?---As I understand it, widespread within cabinet. 20

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And did that stem from some particular philosophical stance, that view of yours? I'm asking you now to just articulate to me why you personally took the view it was just improper for the government to possess or to keep, not matter where you put it - it doesn't matter where you put it, but for any arm of government just to possess this was improper. I just want you to explain to me why you had that view yourself?---I believed at the time and I believe now that it is entirely improper for the government to keep on its files untested defamatory allegations about some person and that's why we put in the Freedom of Information Act a provision that would enable people to access their own personal files and seek to have them remedied.

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COMMISSIONER: Mr Wells, that was already in the grievance procedure under the regulation, wasn't it?---I don't know and I don't know if I knew that then.

Was it?

MR COPLEY: It was. The procedure under the regulations said that something couldn't go onto an officer's file that was critical of them without the officer first being provided with the opportunity to make a comment about it and put forward his side of the story and if he did, his side of the story would go on the file along with the critical piece of information?---It seems to me at this remove that of the other three options that was the one that was regarded as the most plausible but it was not regarded as as satisfactory as the one that the minister came to cabinet with initially.

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See, Ms Warner said that her understanding of cabinet's intention was, "What we're doing will simply bring industrial harmony or peace to a troubled place. If we get rid of these documents which are symptomatic of the tensions that have been going on out there, then that will help settle it down in conjunction with the removal of the manager from the centre. That was her evidence?---That was the objective of cabinet. It was a cabinet that understood industrial issues - - -

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Why do you say that?--- - - - to the extent that you can understand that.

Why do you say that?---Because many of them came out of the Trade Union movement. It was a cabinet that was attuned to industrial issues and so they were doing what they thought was going to lead to industrial harmony. That was an important objective.

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COMMISSIONER: But that was achieved by removing Mr Coyne in part, wasn't it, a stroke of a pen, "You're transferred, Mr Coyne"?---I don't know. That was not my portfolio.

But that was an option to quell any industrial dispute, remove the cause rather than destroy the documents, wouldn't it be?---It would still leave you with whatever problems Magistrate Heiner thought that he had.

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But you didn't know what they were?---No, but we know that he and we respected him. He was a magistrate who had - who was steeped in the law.

But you didn't know - I don't know that he was ever accused of that, but you don't know whether he had any concerns because he never produced a report because the thing was terminated so for all you know his investigations might have said, "No, it's fine"?---Well, his report was to have been about the industrial issues that were in his terms of reference and what we understood was that he was declining to report on the basis of information obtained by a process that could be legally impugned. That was our understanding of it and so we knew that we were getting whatever problems it was that he thought that he had and we also knew the crown solicitor said, "You get rid of these problems by destroying the documents."

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Taking into account the principle of unintended consequences, I mean, you created a big problem for yourself by dealing with the problem in the way you have, as it has turned out?---Well, we knew that doing it would cause a political problem, but we had advice that there would be legal problems if we did not do it.

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I know it's easy for me sitting back here but, for example, it seems to me that somebody needed to have a look inside the box or the documents to see before destruction what was actually being destroyed because, as events later turned out, as we know and as you point out in your statement, the cabinet was accused of destroying evidence of child sexual abuse?---Yes, well, nobody - - -

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Not just scuttlebutt, but that and you have had to defend yourself against that for many years?---Nobody thought that that was what was in the documents because - - -

But no-one knew. That's the point?---Well, we did. We did know something. We knew that the documents had been given to us by a magistrate and if it contained any allegation of criminality, the magistrate more than anybody else on earth would have known to refer it to the police, but it came to us so we assumed that it was allegations of misconduct that didn't amount to criminality of any kind.

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Was that actually operating on your mind, was it, that distinction that you were only going to be thinking about destroying these documents provided they didn't contain any evidence of criminality? That was a precondition to your decision to destroy, was it?---I suppose the answer to your question is yes. I would like to give you a slightly

23/4/13

WELLS, D.M. XN

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different answer. I think I probably would have - I certainly would have. If I thought that they contained evidence of criminality, I would have said, "These should not be here. They should go to the police," but I had no reason to assume that and the reason I had no reason to assume that was because it came from a magistrate and apart from that the cabinet submission itself had been to the police.

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MR COPLEY: Sorry, say that again. The cabinet submission had been to the police?---It was a B cabinet submission.

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Yes, you just mean - - -?---It was not an A cabinet submission.

All you mean by that is that exhibit 151 had circulated through all the directors-general and police commissioner, don't you?---Yes.

You're not suggesting the police got any more than what you got effectively when you received the cabinet submission, are you?---No, the cabinet submission itself had been to - - -

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Yes.

COMMISSIONER: And police weren't giving a clearance or the go ahead. They didn't know any more than you did about what was in the documents?---Every minister gets briefed before they go into cabinet by their department and every department, when they see a cabinet submission, asks the questions that are appropriate to their position in government. So when this went to the police, the appropriate officers would have asked questions.

MR COPLEY: That's just your assumption. You don't know for a fact?---That was the assumption that we were entitled to make as a cabinet.

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COMMISSIONER: That was the process?---That process was going on.

But the Family's minister who would have made most inquiries because she was the mover of the submission. All she knew was that it contained scuttlebutt, from what she had heard?---That's right.

But she was going to know more than anyone else, wasn't she?---That's right.

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MR COPLEY: See, evidence has now come out at this inquiry that there might have been criticisms of the way Mr Coyne conducted his management of the place in terms of whether he favoured one person for overtime or gave other people disadvantageous hours for overtime, but the one allegation that really seems to have emerged that upset him at the

23/4/13

WELLS, D.M. XN

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time was an allegation put to him by Mr Heiner that he was involved in an affair with an adult female colleague.

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COMMISSIONER: At the centre.

MR COPLEY: At the centre?---I don't know anything of this.

Well, wouldn't it be remarkable if at the end of the day that was the sum total of what was really defamatory in those documents?---I - - -

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And if cabinet destroyed all those documents simply because of that one, from a societal and a government point of view, rather insignificant allegation.

COMMISSIONER: Conversely, wasn't Mr Coyne, if it was untrue, entitled to sue whoever said it by using the documents that proved or the best evidence that it was said against him?

MR COPLEY: If he wanted to.

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COMMISSIONER: And why should he have been denied that opportunity because of the destruction of the documents?

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MR COPLEY: Well, the answer to that would presumably be the cabinet didn't knowingly deny him that opportunity because they didn't know what was in the documents.

COMMISSIONER: That's right. So our point is the same, I think, that unless you knew what was in it you were taking an unacceptable risk with one or other or more of the employees whose evidence was in it because you didn't know about this allegation, for example. You couldn't have known the repercussions of the decision to destroy was going to have on ordinary people's lives?---We were being sent the documents. They were sent to us - they were given to us by a magistrate who said that he didn't want to have them for - in the interests of legal reasons.

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MR COPLEY: But he didn't send them to you, did he? He, the magistrate, didn't send them to you, the cabinet?---No.

No?---He gave them - well, when I say - - -

He gave them to the acting director-general - - - ?---So he gave them to the department, yes.

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Yes. And then the acting director-general and the minister were obviously of - or at least the minister was supportive of the matter being brought to cabinet, wasn't it?---She supported the submission in cabinet, yes.

And nobody thought it was a good idea to say, "Look, we'll get somebody responsible such as the crown solicitor to open this box and to see what's in it and to give us, the cabinet, a confidential briefing about what's in it? Because we know what cabinet documents aren't, but a letter from the crown solicitor that we specifically request probably would attract cabinet privilege because it would be a document created for cabinet. So we can safely find out what's in it by asking the crown solicitor to have a look and tell us"?---What you're saying is something we could have done at the time. It's not what we did at the time. It wasn't an option that was before us at the time. When ministers go into cabinet there is a certain number of hours - - -

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Yes, but they don't just leave their thinking caps outside - - -?---No, they don't.

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- - - and say, "Look, I look at this through the options presented to me." Everybody has still got all his individual wisdom, experience and commonsense that he brings into the cabinet room, hasn't he?---Yes, indeed, but you're relying very heavily on the suggestions of the minister who knows most about it, that is the minister who comes into the room with the cabinet submission and who has

had the briefing from the department. The view was quite strong that the documents should be destroyed. The industrial disharmony was a matter of great concern to a large number of ministers and it was emphasised by Anne Warner. That's what happened. Maybe with retrospect we could have included other options in the option paper. Maybe if we'd just hung onto it till the CJC was in place it would have been a whole lot easier, but we didn't know that then. We didn't know what the CJC was going to be, how it was going to be functioning. We were not yet in that situation. We had not moved into what we regarded as the modern era of the administrative and criminal law.

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Did you as the minister - attorney-general - did you see the correspondence that Mr Tait, the cabinet secretary, sent to the archivist to procure - and I don't mean that word pejoratively at the moment - her consent to destruction?---I don't believe I did, no.

Okay?---By then it was a cabinet decision, wasn't it?

It was a cabinet decision to seek the archivist's consent? ---No, that would not have in any usual circumstances come to me.

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And so if the cabinet secretary reports back that the archivist has consented, cabinet would naturally take the cabinet secretary's word for that, wouldn't it?---The cabinet secretary wouldn't report to cabinet, that would come - the report would come through a cabinet submission.

Okay. So if he told the Minister for Family Services - which he did in this case, the evidence shows, in a letter - that it would be appropriate now for you to do up a further submission saying the archivist has consented, the members of cabinet wouldn't see it as their role to go behind that document to make inquiries of their own of the archivist, would they?---No, cabinet does not go behind the document that's put in front of them.

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That's right, that's right. So that's one issue. But in the context of the destruction point where there were misgivings about the wisdom of the recommendation that Ms Warner was making and it was deferred once and an options paper presenting with four options was presented a second time, it wouldn't be the case when one said, "Well, we might get advice from the crown solicitor about what to do here," it wouldn't be seen as being going behind the advice or the recommendation of the minister or the advice of the crown solicitor, would it, it would simply be asking for further and better advice from the crown solicitor? ---I'm sorry, I may have misunderstood the question. I'm not sure exactly what I'm agreeing here. I mean, I think the answer is yes, but I'm not sure that I understand the question, sorry.

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Well, the proposition I just want to posit to you really is this, that cabinet rushed into an issue that it didn't need to make a decision about there and then or ultimately possibly if at all?---I don't believe that we rushed in because we asked for an options paper. If the decision had been going - the decision was going in the direction of destruction from day one, 12 February. If it had been going in the other direction I would have asked the crown solicitor - I would have suggested in cabinet, "Well, before we decide to keep it, let's get a legal opinion on the consequences of keeping it, locking it in cabinet and waiting until we've got some more secure place to keep it." I would have suggested that we get Crown Law advice in those circumstances. That basically is what an attorney-general does in cabinet, is suggest if - - -

Yes. See, that's what I put to you before, that having read Mr O'Shea's letter of 23 January about that government policy, as a lawyer - leaving aside the fact you were an attorney-general, but as a lawyer and having had the advantage of actually reading his advice, not just the summary in the cabinet submission - that with respect to you, you fell down. You failed in the cabinet room on 12 February in not saying, "Look, let's get an opinion from Mr O'Shea about whether or not the policy is able to protect the public servants without going down the path of destruction." I'm putting that proposition to you for you to comment upon?---Yes. Well, thank you. I don't know whether I asked O'Shea that question or not.

If you did, there doesn't appear to be a written record of it?---No, that's because the briefings on Monday morning were verbal. So they come in and the important one came first, so on this day it was probably O'Shea that was first and I would have asked him a series of questions (indistinct) with the conviction that he was very strong in favour of the destruction option.

Okay.

COMMISSIONER: Was it because of your reason; that is that the destruction was favoured because keeping defamatory statements by and about employees of the state was unseemly?---I think that that was part of what was behind what he was saying.

See, I've looked through all the three submissions to cabinet carefully under the heading of Objectives, Body of Submission, Background, and I haven't seen any reference yet - and maybe I can be corrected - to anybody who drafted these documents - either the first one, the second one or the third one - to having any concern about keeping defamatory statements by or about employees on the public record. Everything seems to be focused on the likelihood of legal action, who wants the documents, what they might

be used for, and who needs protection from any legal liability?---You don't see that in O'Shea's writing?

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I'm talking about the cabinet submission because we're looking at the cabinet decision?---So the cabinet documents obviously speak for themselves. I can just give you evidence as to what was said in cabinet and that was one of the things that was emphasised.

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I thought you said when you started that was the major thing?--In my mind it was the major thing. 1

Was it the major thing at the first cabinet on 5 February? ---That was where it was the major thing.

Wouldn't you expect, if it was the major thing on the 5th, that when it came back to cabinet the next time, it would appear in the cabinet submission reminding everybody that that was a major consideration?---The format of the second one would have used the same words as the first one. 10

Even the circumstances had changed, that is, the considerations were different to what they originally started off as?

MR COPLEY: It might be helpful, of course, to remember that the people that draft these submissions don't attend the cabinet meetings.

COMMISSIONER: No.

MR COPLEY: Only the minister does and the accuracy of how the next submission should be worded would depend upon, amongst other things, the deception or the - I don't mean this in a rude way but the level of insight that the sponsoring minister might have about the way cabinet's mind was moving about a matter. 20

COMMISSIONER: I was just thinking if it was a really important issue, I'm sure she wouldn't have missed it.

MR COPLEY: I'm not saying she would have or did. I'm just pointing that out.

COMMISSIONER: I'm just trying to work out if it was an incidental issue, in which case it might be missed and it might not be in subsequent submissions, or if it was really the nub of the conversation, the heart of the matter, as Mr Wells seems to recall it, in which case I would in the normal course of events have expected it to appear somewhere in a piece of writing for - - - 30

MR COPLEY: You will remember that that second submission was not even signed by Ms Warner and it wasn't even signed by the person who was allegedly asking her to take it. It was given to a lady who knew nothing about it. 40

COMMISSIONER: Even in the minutes then - surely in the minutes you say, "We've decided to destroy these documents as a matter of policy because we don't want to keep defamatory material by and about our employees on record." Wouldn't that be in a minute?

MR COPLEY: Possibly, but maybe the answer is that some of these ministers have a different perception about now the way in which the debate moved or what was worrying cabinet at the time. 1

COMMISSIONER: That is why I find it's a bit tricky to discern the consensus?---Nothing in the universe happens for one reason and when you're talking about 18 people in a room, there are 18 views.

I know the cabinet room wouldn't be a clockwork universe, but I thought the way it worked is after all the discussion is over the premier sums up, says what he thinks everybody agrees and that's minuted. Is that wrong?---No, that's correct. That's as I describe it, I think, in the second paragraph of my - - - 10

So let's put you and Mr Goss and all the other ministers back in that cabinet room in 1990. Mr Goss is summing up the effect of the debate. What is he saying, so far as you can remember?---What he says - the summing up is reflected in the cabinet decision as written.

In the minute?---Yes. The cabinet decision doesn't contain reasons. 20

No.

MR COPLEY: No. Can you look at this document, please?

COMMISSIONER: I suppose, to be fair, you wouldn't want them to either, would you? They are a bit like jury deliberations. You like the decision, not the process? ---Commissioner, they are jury deliberations in a sense.

MR COPLEY: If you would have a look at that document, please, it's headed, amongst other things on the front, "Queensland Cabinet Handbook". Just focus on the front for a second because I don't want to tender it if it's not relevant, but you will see it's headed "Departmental Copy". It bears the date 20/3/1990 and it's said to be a final draft which might suggest that prior to 20 March 1990 there were other drafts of this document about. Now, have you seen this book before?---I don't believe so. 30

Okay. Was there a cabinet handbook in existence in February 1990?---Last I remember of that kind of stuff was a document that we were working on, opposition for transition to government document, in which we set out certain procedures, including the kinds of departments there should be and we imported some ideas from Victoria about processes of consultation. That was in 89 and then after we got into government at some stage I'm sure that there was a handbook printed. 40

That might have been 1992 that there was actually an official handbook printed, but it does seem from this document that there was some sort of a handbook floating around in March of 1990?---I can't remember this, I'm sorry.

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You don't recall seeing that?---It was really, really early days.

See, I will tell you why I'm interested to ask you about it. Really on page 1 of the typing which begins "Introduction" at the top at the bottom it says, "1.2 - matters for consideration by cabinet." Forget the index. Just turn through to the first page. Have you got that? ---Yes, Arabic numerals 1.

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That's right. Down the bottom it says, "While not precluded from examining any matter as a general rule" - so it puts that there - "cabinet will consider the following matters of policy," and then over the page there is a list of eight matters that cabinet would normally confine itself to considering, isn't there, contracts over 100,000, appointments of chief executives and judges and important board positions, proposals for legislation, politically sensitive or significant policy issues, et cetera, et cetera?---Yes.

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Now, even though you may not have seen this document in 1990, did that summation of the issues that cabinet would generally confine itself to consider accord with your experience of cabinet in 1990?---In February 12, 1990 we had had virtually no experience at cabinet.

All right?---But at this time it might - I mean, if you're suggesting that this was a response to the Heiner cabinet submission - - -

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No, I'm not; I'm not. What I'm actually suggesting to you is that if the document was around on 20 March 1990, just looking at it - and assuming a document of this nature took more than two or three weeks to write when you look at the contents, what I was going to suggest to you was that the consideration of the fate of the Heiner documents - whilst it might have fallen within the catchall that cabinet can consider whatever it likes, the consideration of the fate of those documents did not appear or does not appear to fall within the broad parameters of the eight subject matters cabinet would normally be concerned with?---It's not beyond the bounds of possibility that this was drawn up the way it was drawn up as a response to the fact that we had had submissions of that kind.

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So it could have been a product of other occasions as well when cabinet had considered machinery matters or matters that were peculiar to one particular part of a government department?---There were some things that came to cabinet

23/4/13

WELLS, D.M. XN

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at that time which later on were resolved within departments as we became more familiar with how the system could be made to work.

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All right. I will have that back then, thanks.

COMMISSIONER: Is that a concession that if the Heiner issue was brought to cabinet after that handbook, it would be rejected as a matter inappropriate for cabinet to consider?---It's quite possible. It's very possible, yes, unless it came into the catchall provision. We were still at that time trying to sort out what need to go to cabinet and what didn't and this, I think, might be part of the response to it.

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I mean, I can't - I don't think I've ever seen this draft. I have seen the cabinet handbook and I do know that cabinet handbooks at subsequent times did give some guidance as to the kind of issues that would come to government.

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MR COPLEY: Well, perhaps I could ask you this question. You were in cabinet until at least the end of the Goss government, weren't you?---No.

Or did you leave it before then?---I was in cabinet until 1995.

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Well, that's what I meant, yes?---I wasn't there for the last term. I wasn't there for the last short term.

You mean after the election in - - -?---After the election of 95 I wasn't there.

All right. Well, in the years between when you joined the cabinet and when you finished up at the election in 1995? ---After the election of 95 I wasn't there.

Well, in the years between when you joined the cabinet and when you finished up at the election in 1995, as the years unfolded did you look back on the Heiner matter and say to yourself, "Gee, if that had come to us in 94 or 93 or 95 we wouldn't have considered that. We would have sent the question of destruction of documents back to the director-general of that department to concern herself with"?---No, I didn't think about it very much at all because it was not my issue. It was not my department and I had a million other things that I was trying to get done.

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Thank you, Mr Commissioner.

COMMISSIONER: Thank you. Mr Wells, was it ever discussed, or was cabinet aware - I'll start again. Were you aware that there was a concern that there would be legal action by the management team at John Oxley Centre against some of the staff at the centre based on the Heiner documents that you were being asked to destroy?---No, I was not aware that there was any legal action that would have required the documents. Indeed, I was not aware that there was any legal action taken.

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Like, for example, what we have you didn't, presumably. On 6 February there's a set of minutes between the director-general and some unionists and - - -

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MR COPLEY: There's a real question mark in the evidence - - -

COMMISSIONER: About that.

MR COPLEY: About the provenance of that material, I think.

23/4/13

WELLS, D.M. XN

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COMMISSIONER: Is there? 1

MR COPLEY: Yes. It's probably - I don't know what question you're going to put to Mr Wells, but I'm perhaps just flagging that one doesn't want to get too definite or adamant about that document made by a union representative about what - - -

COMMISSIONER: Is that the provenance, is it?

MR COPLEY: I think, from memory. I don't have it here. Isn't it one signed by Ms Ball and Mr Mann? 10

COMMISSIONER: Yes, okay. All right. I'll abandon that questioning - - -

MR COPLEY: I don't know what your question was but I just wanted you to be aware of that.

COMMISSIONER: It probably makes the question unnecessary or needless - well, it would be the same thing, wouldn't it?

MR COPLEY: Yes. 20

COMMISSIONER: I'm just looking for a reference in one of the cabinet submissions. Yes, just excuse me for a moment. Can I just take you back to exhibit 151 again, please, Mr Wells? Do you see on - I think it's the fifth page but it's numbered 4 and I'm looking at the third paragraph under the heading Background. It's paragraph number 3? ---"Advice received from the crown solicitor"?

Yes, see that there? "Advice received from the crown solicitor indicated that although Mr Heiner had been lawfully appointed as an independent contractor to perform his tasks there were certain practical considerations which made it inadvisable for the investigation to continue." So we can take it that as at this date, 5 February, the reason that cabinet was being told that it needed to consider the fate of the documents wasn't anything about the appointment of Mr Heiner but some practical considerations that are not specified?---"The lack of statutory immunity from and thus exposure to possible legal action." 30

No, just at the beginning of that third paragraph?---Yes.

You're told that he was lawfully appointed but there were certain practical considerations that made it inadvisable for the investigation to continue?---Yes. 40

Right, that's all you were told at this point?---Yes.

Then, "An important consideration was the lack of statutory immunity from and thus exposure to the possibility of legal

action against Mr Heiner," and do you see the next words, "and informants"?---Yes. 1

So this is an important consideration that only relates to one section of the employees at the centre, those who were informing Mr Heiner. Correct?---Yes.

It doesn't talk at all about the rights of the management or non-informing staff members?---It doesn't say and I didn't know and I'm not sure that I still know - I know even now, that the word "informant" means those who were against the management. I thought it could have meant anybody. 10

Well, let's have a read. Let's read it in full. "Exposure to the possibility of legal action against Mr Heiner and informants," his informants, obviously, "to the investigation because of the potentially defamatory nature of the material gathered by Mr Heiner in the course of his investigation." So presumably whoever they were, these informants, were making defamatory statements to Mr Heiner that gave rise to the risk of legal action. Correct? ---Yes, I take that to mean informants - anybody who was speaking to him. 20

Yes, but, see, the cabinet submission seems to then go on to lump everybody at John Oxley into destruction would benefit all concerned. The only people who would be concerned and be benefitted and who could fall within the definition of "all concerned" would be his informants, wouldn't they?---Yes, but his - I'm taking the word "informants" to mean everybody who was giving evidence before him.

No, you're only concerned about the people who were making defamatory statements and who were informants, weren't you? ---We didn't know who they were. There could have been other, or both sides. 30

True.

MR COPLEY: I just remind you, the evidence is that two of the people who - Ms Dutney and Mr Coyne who had the solicitor write that first letter both gave what they called evidence or information to Mr Heiner.

COMMISSIONER: Yes, but in the course of some of the documents presumably they're the ones who are referred to when the word "the management" is used. 40

MR COPLEY: But - - -

COMMISSIONER: They were the only two management people.

MR COPLEY: We know that, the department knows that, but what does the department choose to tell the cabinet?

23/4/13

WELLS, D.M. XN

COMMISSIONER: But it's a distinction, isn't it? On the one hand there's the use of the words "employees, informants and management". Presumably "management" was used to distinguish people in that group from other employees, and management don't regard themselves and I don't think you would regard them in the normal language as employees, would you?

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MR COPLEY: No.

COMMISSIONER: They're employees of the state but not employees of the centre.

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MR COPLEY: But this is, with respect, not a well constructed document.

COMMISSIONER: Yes.

MR COPLEY: You know, for example, that it merged - it did not clearly replicate Mr O'Shea's advice.

COMMISSIONER: But as at the second cabinet meeting - after 8 February - - -

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MR COPLEY: Yes.

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COMMISSIONER: That's when Coyne and Ms Dutney got their lawyer onto it. 1

MR COPLEY: That's right, yes.

COMMISSIONER: He was clearly acting for management.

MR COPLEY: Yes.

COMMISSIONER: And they were the only ones after the documents that the cabinet was being asked to destroy, weren't they? 10

MR COPLEY: Well, it becomes clearer by the time of the second submission, exhibit 168.

COMMISSIONER: Yes.

MR COPLEY: I think that's probably the one that you have in mind.

COMMISSIONER: Yes, it is.

MR COPLEY: Because - well, it doesn't specify who they are, but it says that, "A number of demands requiring access, including from a solicitor on behalf of certain staff members." That's on page 2 of the submission of 13 February. 20

COMMISSIONER: Yes. And then one of the Objectives headings after that says under the heading Urgency of submission 160 - - -

MR COPLEY: Yes, this is the last one, yes.

COMMISSIONER: Yes. It says, "Speedy resolution of the matter will benefit all concerned." 30

MR COPLEY: Yes.

COMMISSIONER: See, I can't see how anyone could accept that proposition, that all concerned will be benefited by the same action of destruction, but anyway.

MR COPLEY: You'll recall Ms Warner's evidence which she - remember it was put to her - - -

COMMISSIONER: The utilitarian approach. 40

MR COPLEY: - - - rather patronising or condescending approach towards Mr Coyne.

COMMISSIONER: Yes, but she took to stance that you do the greatest good for the greatest number.

MR COPLEY: Yes.

COMMISSIONER: And Mr Wells, in deciding whether or not he should waive his claim for crown immunity, decided that in the circumstances the greatest good to the greatest number would favour disclosure. 1

MR COPLEY: Yes.

COMMISSIONER: Whereas the cabinet in 1990 considered the opposite, that the greatest good for the greatest number favoured destruction. Isn't that what Ms Warner said?

MR COPLEY: Effectively, yes, but she wouldn't concede that she wasn't also protecting Peter Coyne's interests. 10

COMMISSIONER: From himself.

MR COPLEY: Yes.

COMMISSIONER: Yes. And I think I said to him, "Well, wasn't that rather his choice?"

MR COPLEY: Yes, you did.

COMMISSIONER: Yes. And governments don't usually protect people from themselves, they wait till they fall over and pick them up. 20

MR COPLEY: Not from matters as mundane as whether they wish to bring legal actions, no.

COMMISSIONER: Yes, that's right. Especially when you indemnify the person they want to sue. But what I was looking at was there's a question here where it says - there's a statement about the accessibility, it puts beyond doubt that they're no longer accessible. Do you remember that? 30

MR COPLEY: That was in the first submission, I think.

COMMISSIONER: Was it?

MR COPLEY: Yes.

COMMISSIONER: All right. I'll come back to that now. Yes, that's right, it was, too. So this was before - - -

MR COPLEY: The destruction. 40

COMMISSIONER: - - - anybody had even asked for a document - a Heiner document.

MR COPLEY: Well - - -

COMMISSIONER: The submission.

MR COPLEY: The submission doesn't tell cabinet. The very first submission did not tell the cabinet about the letter of 17 January 1990. 1

COMMISSIONER: It'd been asked for but not mentioned.

MR COPLEY: In the context of, "If you're going to proceed with this inquiry you must give us the following things."

COMMISSIONER: Yes.

Sorry, Mr Wells. What I wanted to ask you about was this: if you go to exhibit 151, please, which is the document that I've been asking you about. Under the heading Objective again on page 5, but it's paragraph - - - 10

MR COPLEY: It's page 6, I think.

COMMISSIONER: It's numbered 5, it's page 6, and the paragraph is - sorry, it's page 7, it's numbered 6, and it's paragraph 7. Okay, have I explained that clearly enough?---Yes.

Yes, thanks?---I'm with you. 20

Right. Now, see the second limb of paragraph 7?---Yes.

"As this material" - that's the Heiner documents - "relates to an investigation which has now been terminated and therefore has no further purpose - - - "?---Yes.

"- - - it is recommended that all the material be destroyed except the official material." Then it says, "Such action would remove doubts in the minds of all concerned that it remains accessible." Did you take that to mean that once cabinet made it clear that these documents had been destroyed, all the would-be litigators would know that there's no point going after the documents for production because they don't exist?---No, it wasn't about litigation. I remember - on reading this paragraph again I remember what Anne Warner said at the time in cabinet, she said, "Heiner is not going to report on this material now therefore from an administrative point of view it's useless, we're not going to get any recommendations out of this," and so it's jumped from an administrative point of view. 30

Right. And therefore if you destroyed it no-one would be left in any doubt that they, the documents, were no longer accessible for any purpose?---Nobody would have any perception that you were going to predicate any administrative recommendations on it. The idea was that if you were going to reform that particular area of that particular workplace then you'd start again. 40

Yes, and have no regard to what Mr Heiner gathered?---Yes, 1
from an administrative point of view, clean slate on this
issue.

If your concern was to protect the privacy of the employees
on both sides, what did you think about option number 4 of
exhibit 168, which is the 19 February?---Option number 4.

Option number 4, it's the last page of that document?
---Because - - -

So you've got destruction was 1, and then 2 was public 10
release of the material in a summarised form as a
parliamentary statement. How was that going to protect the
privacy of these documents that were destroyed for the
purpose of privacy?---It wasn't. They were asked to bring
their options to us at large.

Right?---With respect to 4, I don't know, but I have a
notion in the back of my mind that the crown solicitor said
something about how referral of the matter to cabinet for
noting would not give it security.

Yes. No, I think that's right. I think he had said that, 20
so you wonder why it was still there at the very last -
when the decision was taken, which brings me back to where
we started, really. You said that the focus was on not
holding defamatory statements about and by employees and
the official records if you could avoid it. Why was
somebody still, at 13 February, posing as an option the
public release of that material? Hadn't they been
listening?---Because they were supposed to report at large
as to what the options were, they were supposed to - - -

But even by then, surely that was never going to be an 30
option because the whole point of whether to destroy or not
was to protect the privacy of the employees. Wasn't that
the major focus - your major focus, anyway, the first two
categories?---It was my major focus and as I understood,
the major focus of a number of ministers.

Yes?---The person who wrote this cabinet submission was not
in the cabinet room. The - - -

But the minister was?---Yes, but the minister doesn't sit
over the shoulder of the departmental officer while they
drew up the cabinet submission.

The DG does?---Pardon? 40

The DG might?---The DG wasn't in cabinet either.

No, but - anyway, I've heard some evidence about how that
got prepared, so - - -?---Well, if you know something about
the particular instance there's no point in me telling
you - - -

The general process, no. Anyway, okay. All right, that's all I have. Mr Selfridge. 1

MR SELFRIDGE: No questions, thank you, Mr Commissioner.

COMMISSIONER: Mr Harris?

MR HARRIS: No questions, Commissioner.

COMMISSIONER: Mr Bosscher.

MR BOSSCHER: Commissioner, I do have some questions. Is it convenient to have a five-minute adjournment so I can obtain instructions? I can be very short - - - 10

COMMISSIONER: Is that okay with you, Mr Wells? Five minutes okay? We'll be finished before lunch?

MR BOSSCHER: That's what I'm hoping to clarify? ---Whatever suits the inquiry.

COMMISSIONER: Right, thanks. We'll adjourn for five.

THE COMMISSION ADJOURNED AT 12.14 PM UNTIL 12.24 PM 20

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THE COMMISSION RESUMED AT 12.24 PM

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COMMISSIONER: Yes, Mr Bosscher?

MR BOSSCHER: Thank you, Commissioner. Thanks for the adjournment and I will endeavour to get finished by lunchtime if at all possible..

COMMISSIONER: Thank you.

Mr Wells, Mr Bosscher represents Mr Kevin Lindeberg?
---Thank you.

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MR BOSSCHER: Good afternoon, Mr Wells. I have some questions for you, if I may. You indicate in your statement that this particular cabinet meeting or this particular cabinet decision was somewhat of a baptism of fire. It was the first cabinet decision where a difficult decision had to be made and that regardless of the outcome you were going to be damned if you did and damned if you didn't?---Yes, that's correct.

And that was the first type of such cabinet decision that - decision of that type that had come across the cabinet table?---Yeah, it wasn't the first difficult cabinet decision but it was the first cabinet decision where you couldn't win.

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And the issues that you were debating or that you were balancing was the right of an individual to potentially pursue legal rights against industrial unrest at a particular government institution?---No, with respect, that's the issue that you're canvassing. The issue that we were concentrating on was what to do with a bundle of material that a magistrate thought was defamatory or otherwise involved legal complications that were so unacceptable that he wasn't prepared to retain possession of them.

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But, of course, you had never read those particular documents?---Which ones, please?

The Heiner documents?---No.

None of your 17 colleagues present in cabinet that day had ever read them?---No. Anne Warner said that on advice she had not read them and that advice obviously applied to us.

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I think in one of the cabinet submissions it's made clear that her acting director-general hadn't read them?---I believe that that's so too. I don't remember her saying that. I think that it's been testimony before this inquiry.

So far as you attending that particular cabinet meeting that meeting, at the time that you went in there you had

23/4/13

WELLS, D.M. XXN

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already received, you believe, a briefing from Mr O'Shea on the matter?---Yes, I believe so. 1

You had also seen all of the relevant legal advice that he or his office had provided on the matter?---I don't know about all. I remember seeing legal advice that his office had provided and I remember seeing the legal advice that's been shown to me.

Could I ask the witness see exhibit 143, please?

COMMISSIONER: Yes. 10

MR BOSSCHER: Mr Copley showed you that document earlier? ---Yes, I believe I've seen this document before.

You agreed that you saw that as a response to the request to be provided with the crown solicitor's advice in relation to this matter?---Yes.

And I put it to you that you would have seen that prior to attending the cabinet meeting. Is that correct?---It's very, very likely. I believe that's so. 20

So when you went into the cabinet meeting on that particular day, you were also aware, given the content of the third paragraph of page 2 of that exhibit, that solicitors acting on behalf of Mr Coyne and Ms Dutney were requesting copies of the relevant documentation that had been obtained and produced by the inquiry?---Yes, but I also understood that that was in the context of the Heiner inquiry itself so that it could achieve natural justice in the context of that inquiry.

Where did you get that understanding?---Because that's when he asked for it. He didn't ask - you're referring to January. 30

I am, yes. So it's not clear in that paragraph, I'd suggest, that there's any context on the basis of the request being asked there?---But that's when it was.

But was that something that was conveyed to you perhaps by Mr O'Shea?---I don't know; possibly; possibly, but that's when it was. It was when the inquiry was going on and it was obviously for the purposes of seeking natural justice before the inquiry. 40

That's the only particular purpose that it could have been? ---It was the obvious and manifest purpose of it.

It couldn't be simply to obtain the allegations and then insist upon an apology, as you put in your statement? ---Yes.

They're your words that I'm proposing back to you?---Yes.

But it's clear that when you went into cabinet on that particular date you knew that solicitors acting on behalf of at least two of the parties involved in this Heiner affair were seeking copies of the documentation?---Yes.

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And one of the reasons they could have been seeking copies of that documentation was for the purpose of litigation? ---I don't know. It may even be in the crown solicitor's advice. I had a very clear understanding that in January they were asking for documents for the purposes of representing him at the inquiry. That was very clearly in my mind.

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When you were in cabinet. That particular first time that this came before cabinet you were aware that solicitors had sought copies of those documents?---Yes.

That wasn't contained in the cabinet submission produced by Ms Warner, was it, that information?---Which bit of information, that there was a solicitor on 17 January looking for the documents?

Yes?---No, because that related to a period of time before the Heiner inquiry had ended. It was about people exercising their rights during a proceeding that was taking place before a former judicial officer.

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Just to simply my question, the request had been made for the documents. You were aware of that when you went into cabinet that day?---Yes.

Did you inform your cabinet colleagues of that fact?---No, no, it was a fact that was made in the context of the inquiry.

So the answer is, no, you didn't inform cabinet of that fact?---No, nor was it my role to do so.

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As the attorney-general with that information, you didn't believe that was in any way pertinent to assist cabinet in making a decision that it could not satisfy everybody with? ---No, because it was in the context of an inquiry which had been terminated. They were seeking documents that were relevant to an inquiry that had been terminated. If they were seeking them for another purpose, then they would renew the inquiry or the request for the documents - for any other documents.

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Would that then change significantly the relevance of a second request, would it? A second request would change the complex significantly as to whether or not that became an important issue?---It might very well. I mean, I don't know who they were asking it of. They might very well have been asking of the inquiry - of the Heiner inquiry for the purposes of the Heiner inquiry. If they subsequently asked the department, then it would be a different thing and

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would have been reported to cabinet, as indeed it was reported to cabinet by the authors of the cabinet submission in the second and third cabinet submissions. 1

And in what context did you understand that that request had been made?---Which one?

The request for the documents by the solicitors. In what context had it been made to appear in the second and third cabinet documents?---I didn't know the context in the second and third cabinet submissions. 10

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Did you ask Ms Warner or Mr O'Shea or anybody else as to what context that had been made?---No, because we had legal advice which was overarching to the effect that there was nothing occurring that stood in the way of shredding the documents.

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Mr Carmody and Mr Copley both asked you some questions about the issue of indemnifying Mr Heiner?---Yes.

And the purpose of doing that given that the second part of that cabinet submission was to effectively destroy the best evidence that could be used against Mr Heiner or others. Do you recall that?---Yes.

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It was effectively put to you that there seemed little point in indemnifying Mr Heiner if it was going to be the case that the best evidence of any defamation was going to be destroyed?---I referred to some points that were made in cabinet about how a minister distinguished between destruction of evidence and the destruction of a record of the evidence and made the point that the evidence itself would still exist. Now, whether that proposition is good at law - the minister was not a lawyer. Whether that proposition was good at law is a different question entirely. The point is if somebody had those kinds of concerns that you're referring to now, the people were still there to say the things.

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But the commissioner suggested to you, did he not, that a contemporaneous record of what somebody said is the best evidence of that particular utterance?---And I accepted that.

You do accept that?---Yes.

Yes, so it is of itself. You understand that, surely?---I understand that. I'm just telling you what the minister said in cabinet.

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Why didn't - - -?---That contributed to the beliefs that cabinet ministers held.

Why didn't this sail through on that first particular cabinet discussion? Who objected and what was the objection to the destruction of the documents?---I have listed in the statement that I made - I racked my brains to list everything that I could remember. If I was to go on telling you the names of the other ministers who spoke, and there were several, then I'd just be guessing, I'm sorry.

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On what basis were objections made then, to the destruction of the documents?---As I indicated, the theme was what does, minimal, this government require in these circumstances where - on a highly to nothing, whichever thing we do was not going to be right, so what do we do to

optimise. That was the discussion, and it was a discussion about administration, it was not a discussion about law. Most of the ministers there didn't have any familiarity with legal concepts at all. 1

COMMISSIONER: Sorry to interrupt, but Mr Comben suggested that of the lawyers in cabinet there was the premier, yourself, and who else in cabinet was a lawyer at that time, do you remember?---Paul Braddy.

Paul Braddy, that's right. He said that the lawyers in the room showed a fair bit of interest. Does that accord with your recollection of things?---I referred to that in my statement and recorded what I said. If that satisfies Pat Comben's suggestion that they showed a fair bit of interest, well, I don't know. He may have been making a judgment about body language or the way people spoke, I don't know, but I certainly spoke and what I said I've recorded there as best I could. 10

What about the premier's contribution to the discussion? Can you help me with that?---He made the point - - -

He was captain of the team. I'm just interested to know for completeness what contribution he made to the debate or the decision-making?---He made the point about the CJC and how this was obviously some sort of allegation of misconduct and it could in a little while be referred to the CJC. These people would have their rights to take it to the CJC because we were going to have a misconduct division there. It's a pity that it happened so early, was one of the things he said. He also summed up the cabinet decision and the decision reflects his summing up. 20

Was that the extent of his involvement that you currently recall?---I think that as soon as Anne had finished saying what - I think as soon as Anne Warner had introduced it he said something to the effect that this was a difficult problem that had been brought to cabinet. I'd be guessing if I then went on to tell you any more. 30

All right. Thank you. Mr Bosscher?

MR BOSSCHER: Thank you, commissioner.

Do you recall Mr Braddy raising anything in those cabinet discussions as the third lawyer present?---No, I don't. 40

Certainly you have a specific recollection of the premier raising issues for discussion. What about yourself? Did you raise issues for discussion at that meeting?---Yes, the ones that I've referred to in my statement.

It's confined to that's the best of your recollection?---As far as I recall, I spoke only once. It was usual for a minister to speak only once when they were not the minister

introducing the submission or a minister whose department had a contrary view. 1

Now, you understood and cabinet understood that the content of the documents contained potentially information of misconduct and potentially were also of a defamatory nature. That's right?---Yes.

Of course, nobody in that room had ever read them?---Yes.

But you were proceeding as a cabinet on the basis of an understanding that those documents may have contained allegations of misconduct of some sort, firstly. Do you agree with that?---Yes. 10

Secondly, that they may have been defamatory in nature? ---Yes.

Do you agree with the proposition that those documents may have been evidence of either of those two things?---There was no court proceeding on foot or in sight in respect of which they could have been evidence, however - - -

Whether or not there was a court proceeding on foot, Mr Wells, is irrelevant. That they could have been - those documents may have been evidence of either misconduct or alternatively of defamation?---Hypothetically, in some possible circumstances, yes, they could have been. 20

They could have been, and in fact they could have been evidence on what you knew as you sat in that cabinet room of criminal conduct?---No, because if they had been evidence of criminal conduct they would have gone to the police. That's where Heiner would have sent them. He was a magistrate. 30

That's an hypothesis by you?---Well, it's reasonable, I'd suggest.

It is simply a hypothesis by you.

COMMISSIONER: Well, it was your expectation?---Yes.

MR BOSSCHER: But you don't know that as a fact?---It would be astounding if a magistrate heard evidence of criminality and then sent it to a cabinet. That would be - you know, we'd been out of government for 32 years, but even we knew, every one of us, that that's not how things happen. 40

COMMISSIONER: Even in the context, though, of this inquirer who at some point became concerned about his own legal position and said, "Thus far and no further until I'm indemnified," effectively. I mean, might it - and who knows what he had at that point, and until the indemnity

question was sorted out he wasn't doing anything, maybe including going to the police. Did you think about that?
---No.

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MR BOSSCHER: It was equally - - -

COMMISSIONER: Because he'd downed tools, effectively, hadn't he?---I know more about that now from reading the transcripts of this inquiry than I knew back then.

Yes?---What I knew back then was what I've said in the statement, that we were told that Heiner believed that he was now running an inquiry that could be legally impugned and he wasn't prepared to report on the basis of the facts that he'd gleaned as a result of that process.

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And then between the cabinet meetings though it emerged that the department had actually terminated his services. Wasn't that right?---I don't know. I've seen on the records of your inquiry a letter drafted by the crown solicitor saying, "This is the terms in which you could terminate his services," but I've also seen evidence before your inquiry that said that he had resigned or had refused to take it any further. Certainly the way Anne Warner put it in cabinet was that he was unwilling to continue in these circumstances.

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On going back to that exhibit number 151, this is the first cabinet submission on page 7 which is numbered 6, paragraph 6, "Having considered the crown solicitor's advice and the limited value of its continuation" - that is, the inquiry's continuation - - -?---I'm sorry, commissioner, I can't quite find - I'm not quite with you yet.

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On page 6 of 151. It's numbered 6 anyway; page numbered 6 and paragraph 6 on that page?---"Having considered the crown solicitor's advice and the limited value of its continuation - - -"

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"It has been decided to terminate the investigation"?
---Yes.

So as at the cabinet meeting, that is, the first one - what was that, 5 February?

MR.....: 12th.

COMMISSIONER: Which one?

MR.....: 12 February.

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COMMISSIONER: 12 February.

You knew that the inquiry had been terminated because it had limited value and there were practical problems with it?---Yes. What I suspect that this is saying here is that - the point that I made previously that the purpose of sending him in there in the first place was to get a set of recommendations to resolve an industrial issue and that purpose was now - that purpose was now incapable of being achieved and therefore there was no point in going ahead.

Yes, but we know it was terminated. I'm just saying, bearing in mind your expectation that if he had found some criminality, he would have referred it to the police, do you think that still applies in the circumstances where he downed tools and was then terminated?---I would assume so. I mean, I would.

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The circumstances of his termination didn't change your expectation of his - - -?---No; no, I mean, he wasn't just an ex-magistrate. He was also a citizen. 1

Sure?---He would have done - he would have taken with him into his citizenship an understanding of what was appropriate.

He would have done the right thing even though the thing was terminated and his position limited because he was uncertain?---Yes, he would have done the right thing whether he was being paid for it or not. 10

Sure. Yes, thanks, Mr Bosscher.

MR BOSSCHER: Thank you, commissioner.

And the right thing, of course, may have been to cease to take evidence if the evidence he was getting was outside of his terms of reference and send the material back to the department to take action upon?

MR COPLEY: That question is hypothetical because that's not what Mr Heiner did. 20

COMMISSIONER: Yes.

MR COPLEY: He didn't cease inquiring because it was outside his terms of reference.

COMMISSIONER: Does the answer or the question somehow assist in working out why the cabinet reacted in the way they did or is it just hypothetical, as Mr Copley says?

MR BOSSCHER: It's probably a bit beyond what Mr Copley says. Let me withdraw it and come back to it when I need to. 30

COMMISSIONER: All right.

MR BOSSCHER: We can argue it then.

COMMISSIONER: Okay.

MR BOSSCHER: Mr Wells, so far as that first cabinet meeting was concerned you indicate that the position that the premier adopted with one of the other lawyers present was that the documents could be destroyed and even if they were destroyed and people had an issue with that, they could then take their complaints to the yet to be created Criminal Justice Commission. Is that a fair reflection to the premier's attitude?---That was one of the things that he said, yes. The reflection of the premier's attitude is, of course, the cabinet decision itself. 40

But he made that clear comment that the documents themselves are irrelevant, "Anybody who has a grievance, if there is misconduct alleged in those documents or there is defamation in those documents, then those people can just sit on their hands until we get around to creating the CJC and then they can wander on down there"?---Nobody said that the documents were irrelevant and the decision between destroying evidence and destroying a record of evidence was not the premier. That was another minister. Before the premier spoke another minister spoke and made that distinction, that the complaints, whatever the complaints were, could be made subsequently to - the CJC was a point that the premier made. The point that whatever was in the Heiner records could be repeated by the people who said it - that was made by a different minister before the premier spoke.

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But the position I put to you that the premier adopted is fairly put to you and that was part of his attitude, that "The documents could be destroyed and people can go and complain later on when we put together the CJC, if they so wish"?---At that point in the conversation it was more along the lines of, "It's regrettable that this is coming to us now. If it was further down the track, then we would be able to just run this through the CJC."

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I suggested to you that the documents may have contained evidence of criminal activity and you were aware of that? ---You're suggesting that I was aware of it?

Yes?---I was aware that they may have contained - - -

May have contained - - -?---No, absolutely not.

Absolutely not. When you sat in that cabinet meeting, you were aware that the documents may have contained evidence of defamation?---Yes.

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You were also aware that the documents may have contained evidence of criminal defamation?---I didn't say that. I said that somebody could allege it and I wondered how far people could get with it.

You were aware that the documents could have obtained evidence of criminal defamation?---I wasn't making a legal judgment about it. I said that somebody could allege criminal defamation in respect of a matter and therefore it might be something - the way it would have went is if the cabinet decision had been to keep it, I would have said, "Well, let's run this question past the crown solicitor before we make that decision."

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COMMISSIONER: They have repealed criminal defamation now, haven't they?

MR BOSSCHER: Not at that time, I don't think.

23/4/13

WELLS, D.M. XXN

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COMMISSIONER: Not then? 1

MR BOSSCHER: No.

COMMISSIONER: When are we, 1990? When was the last prosecution for criminal defamation?

MR BOSSCHER: The attorney-general sitting in this - former attorney-general sitting in this room had one come across his desk, according to his statement.

COMMISSIONER: When was that? 10

MR BOSSCHER: I will ask the witness to answer?---I think it was 1991. I'm just going from memory.

COMMISSIONER: Was that the letterbox drop down at - - -? ---Yes.

I prosecuted that. It must have been?---You prosecuted it?

Yes. That was the last one, as I remember it, so 1991. So what are you saying, Mr Bosscher, the chances of criminal defamation are? 20

MR BOSSCHER: I'm suggesting to the witness that he was aware the documents may have contained evidence of criminal defamation?---Yes, I was thinking of doing a review - I was planning to do a review of defamation law and so I was aware of criminal defamation and I made a mental note if the debate had gone had gone the other way, I would have said, "Let's get Crown Law advice as to whether we might be exposing ourselves not only to defamation but criminal defamation if we keep the documents."

So that's if the decision had gone the other way and cabinet decided not to destroy that evidence?---Yes. 30

But because cabinet made the decision to destroy the evidence, then any potential criminal defamation went away as soon as the documents went into the shredder. Is that what you're telling us?

MR BOSSCHER: No, he's not actually telling us that.

MR COPLEY: The witness can answer that. I asked the witness what he's telling us. 40

COMMISSIONER: Whoa.

MR COPLEY: The witness - - -

COMMISSIONER: Sit down, Mr Bosscher. Mr Copley is on his feet. He's got the floor.

MR COPLEY: The witness just speculated to himself, "Oh, I wonder if they might contain evidence of criminal defamation." That's all the witness apparently did. He just speculated to himself and wondered to himself and that was all.

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COMMISSIONER: Okay.

MR COPLEY: Just because he wonders something doesn't mean that they did, it doesn't mean it's likely that they did, and no-one can go off now and claim that, "Oh, they destroyed evidence of criminal defamation." It's ridiculous.

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COMMISSIONER: Okay. Thanks for that, Mr Copley.

Now, Mr Wells is the one on oath. Is Mr Copley right, Mr Wells?---100 per cent.

Okay. Mr Bosscher.

MR BOSSCHER: You say in your statement, Mr Wells, at page 4, bottom paragraph, as follows - - - ?---I'm sorry, page what?

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Page 4, paragraph 14?---Of my statement?

Yes:

I had an additional concern at the back of my mind which I did not articulate in cabinet. It was a remote possibility which I intended to mention if necessary, but it was hypothetical given the way the discussion went. The statutory provision relating to criminal defamation was rarely used, though there was in fact a case that crossed my desk in the early 90s. In any case I was aware of it because I was planning a review of the defamation law and the existence of this offence was one of the issues for consideration. My thought was that if anyone wanted to run a test case on the scope of the criminal defamation provision for mischievous or other reasons, a test case against the government would be a good candidate because the highest standard the courts tend to require governments would make the culpability greater.

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That's all your statement?---Yes.

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I knew that if such a case was brought there would be statutory defences available, but being concerned to ensure that the public confidence in the administration of justice it was maintained, to avoid creating the circumstances in which a prima facie case could be made out, was obviously desirable?

---Yes.

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So one - - -

COMMISSIONER: Who was going to be the defendant in the potential criminal defamation action?---I'm sorry, Commissioner, I couldn't - - -

Who was the potential defendant in a criminal defamation scenario?---My speculation was that if you wanted to run a test case on that you bring a test case against the government.

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You'd sue the state of criminal defamation because they what?---Because they kept the documents on file.

And how would that qualify for the elements of defamation as they stood in 1990?---I don't believe that they would have, I believe that there would have been defences available.

They wouldn't have got past - there wouldn't have been a prima facie case because holding defamatory material is not republishing it, and don't you need to do something with it?---I understand you've got to do something with it, and may be putting it in - we didn't have legal advice as to what we would need to do with it in order to get that. We weren't going down that track. The legal advice was saying destroy, so we weren't going down that track. I would have mentioned this. This was actually something that I would have mentioned if we'd been going down the other track. Like I said, "Let's get Crown Law advice on this."

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But say if you wrote me a letter defining Mr Copley there and I kept it in my drawer and every now and again I went and had a look, even if I didn't have snigger, I wouldn't be defaming him as well, would I, just because you sent me the letter?---I don't know. Do you know?

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I don't think so, but anyway. Well, I can tell you that I'm pretty sure I wouldn't be. I'm not republishing it, I'm just enjoying myself with it. And you've given it to me, I didn't ask you for it, you gave it to me. You defamed him, I didn't?---And you think you wouldn't have a legal problem?

I don't think so, no. I'd be pretty happy to contest in court?---Good luck with that, Commissioner. We weren't prepared to take the risk.

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Fair enough.

MR BOSSCHER: So in an endeavour to avoid the risk - the easiest way to avoid that risk and to avoid a prima facie case being established was to shred documents?---If we'd

been going the other way we would have asked for Crown Law advice.

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Isn't it prudent if there was potentially evidence of criminal defamation in those documents, whether the government was a party to it or not or whether individuals are parties to it or not, to obtain that advice before you shred the very evidence that may constitute a criminal defamation?---This was a reason for not keeping it. This was a reason for not keeping it, it was not the motive for shredding it.

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COMMISSIONER: I suppose there's a distinction, too, because you're talking about the documents being the defamation as opposed to being evidence of defamation.

MR BOSSCHER: No, if I'm making that mis-distinction, I apologise. They are evidence of it, they don't constitute the defamation themselves. The defamation would be the statement that was made.

COMMISSIONER: Or the publishing of it.

MR BOSSCHER: Or the publishing of it. The documents would constitute evidence that the statement was made?---I thought that there were legal problems with keeping the documents, but that the crown solicitor had said, having considered all, that it was okay to shred them. That was my belief at the time.

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The crown solicitor hadn't in any of his advice is that you'd seen on this day considered the issue of criminal defamation?---It was just a speculation.

Well, it's a speculation that you had in your mind at the time you sat in cabinet?---Yes, it might have been seriously wrong to keep the documents.

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It never crossed your mind that it might have been seriously wrong to destroy documents that may have constituted evidence of a criminal offence?---It's seriously wrong to commit a criminal offence. If we were committing the criminal offence by keeping them, that was the most serious wrong that we needed to address.

But you had no advice that you were committing a criminal offence by keeping them?---No.

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In fact, your advice was could destroy them?---No, and I would have sought that advice - - -

COMMISSIONER: Sorry, Mr Bosscher, have you finished your question?

MR BOSSCHER: Thank you, Commissioner, yes.

COMMISSIONER: No, I don't think Mr Wells heard it, can you just - I didn't even hear it, can you - - - 1

MR BOSSCHER: You had no advice that keeping those documents was a criminal offence?---No, and if the decision had been going in that direction I would have said, "Hang on a second, let's get Crown Law advice as to whether we commit a breach of the law by keeping them." That seems to be the implication of the advice that we had, but I would have said, "Let's get further advice."

COMMISSIONER: But on this issue - - -?---This would have gone to two or three cabinet submissions whichever way the decision went. 10

But you already had advice there was no legal impediment to destroying them so that solved your problem, didn't it? ---That was our overarching belief. That defined our belief about the situation.

So you didn't have to grapple with the problem of keeping them being criminally defamatory, or evidence of it, because your option was you could destroy them and solve that problem along with all the other problems?---Yes. 20
Yes, it was a hypothetical that would have become relevant in other circumstances.

Yes.

MR BOSSCHER: Well, it was more than a hypothetical because you say in that statement, "I believe that such a possibility, though unlikely, was a real one, and that was an action against a government criminal defamation."

COMMISSIONER: Sorry, I'm not sure what that all means, but allowing for the possibility that though unlikely, was nonetheless real sounds like a hypothetical to me. 30

MR BOSSCHER: It was something - - -

COMMISSIONER: I mean, it's a mere possibility.

MR BOSSCHER: I withdraw that, then. It was certainly a possibility that you believed existed?---I didn't believe that it was fanciful, I thought it was hypothetical. And if the situation had been different and cabinet was going in the other direction then I would have treated this as something that I should be alert to get - to ensure that Crown Law advised on again. 40

COMMISSIONER: See, the problem with possibilities and acting on them is that everything is possible.

MR BOSSCHER: Of course, but if it's in his mind at that time, as he deposes to mean that statement - - -

COMMISSIONER: Well, to the extent that it might be a motivation for a decision or an action, by all means, but instead - or really that that wasn't really his motivation, it was a thought, but he was motivated to accede to the discussion because of the legal advice.

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MR BOSSCHER: Well, what he said was that he didn't need to consider that further because the decision was to destroy.

COMMISSIONER: Okay. It didn't motivate or explain any action that he did that's relevant to me, did it?

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MR BOSSCHER: No?---The way you would run this - if I may?

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COMMISSIONER: Yes, sure?---The way you would run this is if you wanted to do it you would start out by making the allegation under parliamentary privilege and calling for an inquiry. That's what you'd do. It was actually a political risk that I was adverting to in the first few sentences of this.

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You mean you'd disclose the information in the documents that were - in the Heiner documents under parliamentary privilege and then ask for a - - -?---No, I'm sorry, I'm talking about the allegation of criminal defamation. If a mischievous person wanted to run a criminal defamation case then what they would do would be to get somebody to make the allegation that there had been criminal defamation under parliamentary privilege. So you'd run it up the flagpole and see if anybody selected it and then you'd have speeches in parliament calling for an inquiry into whether criminal defamation was being committed by the government by keeping such documents on file. That's how you would begin it.

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I reckon that would be a pretty short inquiry, Mr Wells? ---It would be - yes, but it would be a long-running political episode.

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Yes?---This was a cabinet meeting and what we were addressing was - well, what was before our minds nearly all of the time was administrative and political issues, especially at all legal issues, the reason being that again, overarching everything was the crown solicitor's advice. We believed implicitly that there was no legal impediment, there was no process, no inquiry, no anything going on that prevented us from lawfully destroying the documents.

But at the end of the day I think it's inescapable, isn't it, that however you cut it there was - if there were defamatory statements somebody was being defamed, and in destroying the documents that was the best evidence of that defamation was going to deprive that person if they ever wanted to sue their defamers of the best evidence in their case?---Yes.

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One of the potential defendants in that case were all the people you had just indemnified either under policy by - and Mr Heiner by extension?---If we kept that defamation, which we were given to understand was only - was in the box, then we would be doing more than simply keeping it, we would be giving credence to it. Its administrative status was as a box full of junk, in the context of the fact that the inquiry was no longer going to serve its purpose, presenting any recommendations. Any set of recommendations would have to be predicated on something else, somebody else starting all over again. So from an administrative point of view you simply get rid of it. The conversation

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in cabinet was nearly almost entirely about administrative questions and about whether it was a good idea to keep nasty stuff about your own - - -

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No, but my point was that the litigation rights of the defamed were overlooked by cabinet?---We were told and believed implicitly that it was lawful to destroy them and we believed that we would do more good by destroying them than by keeping them, on the whole.

That's pretty much what Ms Warner's position was too. Do you agree with her utilitarian approach?---Yes, I do, but there's principles that are relevant also, and one of those principles is that the government should not choose to do something that's going to harm one of its own citizens, and to keep stuff on file that was defamatory of our citizens was something we should not choose to do if we could choose not to do it. That was our understanding at the time. That was our belief.

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But you know how sometimes regulatory decisions can have counterproductive effects, that is, you bring in a rule that says you've got to have less air pollution mechanisms on your cars otherwise you can't - you know, that's what you've got to do, so people don't change their cars because they can't afford the new mechanisms and you've defeated your very purpose, because you've still got old bombs on the road instead of clean air cars because you've brought in a regulation. Well, isn't that a bit the same here where you say it's not right for a government to hold defamatory material of its citizens, but one of those citizens might actually want to use that defamatory material to defend himself in a court. Should you really deprive that person of that litigation right, that individual right?---Well, we were told that there was no action that had been commenced. We were told that in the first cabinet submission.

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Sure, and then you were told, "You'd better hurry up and make a decision because we've been getting some letters from lawyers and your speedy resolution is required. We want to put it beyond doubt that they're no longer accessible"?---The speedy resolution referred to the industrial situation and the letters from lawyers - - -

No, no, let's be clear about it. You might be right. I just want to check?---One of the - I'm sorry.

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My recollection is the speedy resolution will benefit all concerned and divert possible industrial unrest. That's what the urgency was in the first one?---That's what I had in mind, commissioner.

Yes, and then as things unfolded, the next cabinet memorandum was, "The fate of the material gathered by Mr Heiner has yet to be determined. This is a matter of

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urgency as there have been a number of demands requiring access to the material, including requests from solicitors on behalf of certain staff members." So the urgency was gathering pace?--Well, no, not necessarily, commissioner. There was no amendment to the previous advice that there was no legal action commenced.

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No?---We were not entitled to assume that the solicitor was seeking to acquire the documents for those purposes, for the purposes of litigation that would have required those documents.

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But were you entitled to assume the contrary then?---No. We had no basis for assuming anything except that on 19 February for at least a week and on 5 March for several weeks a solicitor was looking for the documents but that it was still the case that no legal action had commenced.

Strictly true, conveniently, but we also know from the very first advice that the solicitor-general gave that if an action ever was instigated his advice wouldn't apply. That is, if it ever got to the point of being on foot you'd have to produce in the ordinary course of the litigation proceedings?---That's right.

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So if you never wanted to produce them and you always wanted to - well, if you wanted to make sure that they would always be inaccessible, you had to destroy them before anything got on foot, didn't you? Once it was on foot you couldn't destroy them. That's the point?---That's absolutely the case, and our advice that it's not on foot and therefore it was lawful.

But when you get a solicitor's letter it's getting closer to being on foot than further away, isn't it?---Well, not necessarily, commissioner. There might have been very many reasons why he wanted them, wanted the documents, good and bad.

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Well, what was the only legal action you were focused on. Apart from criminal defamation, what was the only legal action in your contemplation in 1990 in that cabinet meeting? It was defamation by - - -?---Defamation?

Yes, wasn't it? That was the only legal action that realistically might ever be instituted in these circumstances?---I'm not sure of that. It might have - - -

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What else were you indemnifying Mr Heiner against? It wasn't against going through a stop sign or a red light, was it?---Somebody could have sued him for something to do with - I don't know. I'd only be speculating.

Yes, I mean, the only word that was mentioned in the context of the document was "defamation", wasn't it? ---That's what the crown solicitor concentrated on. 1

Are you really telling me that once solicitors letters on behalf of staff at this very centre who might have even been defamed or the defamer was writing letters to government seeking access to these documents that you were thinking about destroying was not getting closer to the point of potential litigation?---We had no reason to assume that and the longer it went without there being any litigation, the more reason we had to assume the opposite. I mean, there's very little reason for assuming anything out of this, may I suggest, but we were told in the first cabinet submission no legal action. We were told subsequently a solicitor's interested but we were not told he said anything about legal action and then we were told a couple of weeks later a solicitor's interested but we're not told again that it had anything to do with a legal action. What we were thinking was, "If he's asking for the document, we've either got to give it to him or find some way of not giving it to him. If we give it to him, then are we publishing defamation about one of our own employees?" That's what we were thinking. It was about publishing defamation. It wasn't about a court case which we were still entitled to believe had not commenced. 10 20

Right. So you actually did think about it and you thought that maybe the solicitor was after some of that Heiner material which was defamatory and if you gave it to that person, that solicitor, that you would be republishing and that's why it was urgent for you to make a decision one way or the other?---Maybe.

Maybe, yes. All right. Did you make any inquiries as to exactly what the solicitor said he was after the documents for? Maybe that might have shed some light on what his mutation was?---No, but it was not my portfolio. If it had been my portfolio, I would have asked. 30

Yes, all right. I have been directed to inquire into not just the legality of the decision but its appropriateness as well. Did you want to make any comment about that? I mean, is your position the same in respect of appropriateness as it is in respect of the allegations of criminal conduct, that is, there was nothing on foot. You had legal advice that you accepted that technically there was no legal impediment to the destruction and therefore it was not only legal but also appropriate?---We believed implicitly that there was no legal reason why we shouldn't do it because the crown solicitor told us that and also at the time we had no intent to avoid any judicial proceeding or to remove evidence. The direction of cabinet's decision was actually set in the first cabinet meeting before we were told - before cabinet was told of an interest post the Heiner inquiry itself in the documents. 40

23/4/13

WELLS, D.M. XXN

If it was asserted to you, leaving aside the question of the legality, the legal impediment instruction, it was otherwise inappropriate for you to do it, would you say, "No, it was perfectly appropriate"?---I would say whether it was a suboptimal thing to do or not I don't know. 1

Knowing now how the CJC operates, I suppose - you know, if you press me on the point of what is the optimal thing to have done in the circumstances, I suppose I would say now that we know how the CJC operated and things that it could do it would have been wise to seek advice as to some way that we could hang onto this without disclosing it for a little while until we could just give it to them and say, "This is your territory now." That would have been better but we didn't think of that because the CJC was so new. We were just in the process of - it was the Fitzgerald process we called it. We were implementing the recommendations of the Fitzgerald report, the Electoral and Administrative Review Commission and the CJC, and it was all new. 10

So you think looking in hindsight there was something that you could have done that was more appropriate but this was still legal, what you did, destroying documents?---In the light of the information that we had I don't know - I don't know that we could have done anything else, but if we now knew about how the institution of the CJC - if we had then known how the institution of the CJC was going to work, we would have understood that it was the ideal body to deal with this particular kind of issue, but we didn't know that back then because the world was different then. We had not changed it by introducing EARC and CJC. 20

Thanks, Mr Wells. Sorry, Mr Bosscher, I interrupted you.

MR BOSSCHER: I have nothing further, thank you.

COMMISSIONER: Mr Copley? 30

MR COPLEY: No, I have nothing further, thank you.

COMMISSIONER: Are you sure?

MR COPLEY: Yes.

COMMISSIONER: Mr Wells, thank you very much for coming in. You are formally excused from your summons. We appreciate your time and I'm glad it's you and not me there. Thank you?---Thanks very much. 40

You are formally excused.

WITNESS WITHDREW

COMMISSIONER: Mr Copley, how are we tracking?

MR COPLEY: There is some further material that I will tender. The first is I tender the statement of Fabian

23/4/13

WELLS, D.M. XXN

Poulos which is dated today. He's a detective, as you know, attached the commission of inquiry. It's a statement that just sets out some of the limitations that the police have encountered in the course of their investigation.

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COMMISSIONER: That will be exhibit 352.

ADMITTED AND MARKED: "EXHIBIT 352"

COMMISSIONER: Is it appropriate to publish?

MR COPLEY: Yes, it can be published.

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COMMISSIONER: I direct it be published.

MR COPLEY: I tender a death certificate for Noel Oscar Heiner that establishes that he died on 23 June 2008.

COMMISSIONER: The certificate will be exhibit 353.

ADMITTED AND MARKED: "EXHIBIT 353"

MR COPLEY: I tender a death certificate for Alan Charles Pettigrew which shows that he died on 16 December 1993.

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COMMISSIONER: That will be exhibit 354.

ADMITTED AND MARKED: "EXHIBIT 354"

COMMISSIONER: Mr O'Shea?

MR COPLEY: On 5 April 2013 I caused a letter to be sent to every surviving member of the cabinet of March of 1990 except for Mr Wells and Mr Goss. The letters were all in the same terms. If you wish, I can tender all of them and make them one exhibit or I can tender one simply as a representative of all of the letters sent.

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COMMISSIONER: I think you tender one with a cover sheet with the names and addresses of all the recipients.

MR COPLEY: All right. I will have the cover sheet prepared later and attached to the exhibit. So for the purposes of this I tender the letter that was sent to Mr Neville Warburton and ask you to make that an exhibit but it might be prudent just to have his address which is at the top left of the letter obscured before it's published.

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COMMISSIONER: All right, yes. I'll make the letter of 5 April 2013 to Mr Neville Warburton exhibit 355 as a representative sample of the letters that were sent to all the surviving members of the March 1990 cabinet.

ADMITTED AND MARKED: "EXHIBIT 355"

23/4/13

COPLEY, MR

COMMISSIONER: I'll order the suppression of his address and leave it to you to add to that exhibit a cover sheet of all the other recipients of that letter by name only.

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MR COPLEY: Yes. The ministers, all except one, replied to the letter by advising the police of their attitude and their advice to the police - their attitude is replicated in Detective Collis's statement. The statement invited those ministers to peruse the transcript of Ms Warner's evidence, a copy of which was provided, and it invited them that if they wished to appear at a public hearing of the commission to testify about why cabinet made the decision to enable the destruction, that they were welcome to do so.

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And the letter advised them that unless they or a lawyer acting on their behalf contacted the commission by 15 April and indicated that they wished to give evidence, the commission would proceed on the basis that they were content for you to act upon the evidence given by Ms Warner in this regard. And it was pointed out to them that one person with authority to appear had been alleging that the members of cabinet committed a number of offences against the Criminal Code. No such allegation was put to Mr Wells today of course.

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The purpose of the letter was to ensure that those gentlemen - because they were all men - were accorded the opportunity to be heard, should they wish to be heard. It wasn't perceived that the commission needed to hear from them, but rather that they needed to be given the opportunity to be heard if they wished to. None of them have decided to take advantage of that. They don't wish to be heard. They're content to leave the matter on the basis that Ms Warner testified.

COMMISSIONER: And a different approach was taken to Mr Wells because of the office he held as the attorney-general?

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MR COPLEY: Well, not just that, but also the evidence that someone acting on his behalf called for - and we now know received - copies of Mr O'Shea's advice before the meeting, so that he had an opportunity perhaps better than the others to consider what position cabinet should adopt towards the question of destruction.

COMMISSIONER: And so we wanted to hear from him regardless of whether he wanted to appear.

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MR COPLEY: Be heard from, yes.

COMMISSIONER: Right. And Mr Goss?

MR COPLEY: In connection with Mr Goss, the statement of Detective Collis will inform you that inquiries were made

regarding his present state of health and to that end it
doesn't tell you what the outcome of those inquiries were,
it doesn't need to, because yesterday a letter was received
from a Dr Hall, concerning Mr Goss's state of health - - -

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COMMISSIONER: What sort of doctor is he?

MR COPLEY: A neurosurgeon, I think, from memory.

COMMISSIONER: He's the treating doctor for Mr Goss at the
present time. He's not the only specialist who's treating
him, it would appear he is one of three specialists who are
currently treating him.

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COMMISSIONER: All right. Well, do you want to tender
the - - -

MR COPLEY: I would like to tender that letter as an
exhibit but ask you to consider not publishing it. Mr Goss
has not communicated with the commission about it. I
haven't asked the police to find out from Mr Goss about how
he feels about it being published, it is solely my
submission to you that it contains matters personal to his
state of health and that it should not be published. You
have the benefit of reading it and you can see from the
letter that he is not currently in a position where he
would be able to testify at a public hearing; he was not
likely to be so for a further period of time; and the
possibility that he might be before 30 June is no more than
that, simply a possibility, but this particular doctor
can't say whether he will be, and he also says that that
possibility would be contingent on the views of two other
specialists.

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COMMISSIONER: Subject to what anybody else has to say, my
view without hearing argument is that the purpose of the
report from Dr Hall is to really inform me whether or not I
should take steps to invite Mr Goss or compel him to appear
to testify and whether if he was compelled, he's likely to
have a reasonable excuse or not. So I will use it for that
purpose. Nobody else thinks to know what's in it.

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MR COPLEY: Yes.

COMMISSIONER: I'll make it an exhibit, exhibit 356, and I
direct it not be published.

ADMITTED AND MARKED: "EXHIBIT 356"

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MR COPLEY: Thank you. Now, that's the only material that
I wish to tender, but I understand that my learned friend
Mr Selfridge has two affidavits or statements that he
wishes to tender and there's no objection to that course
being followed.

COMMISSIONER: Thank you. Yes, Mr Selfridge.

23/4/13

COPLEY, MR

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MR SELFRIDGE: Thank you, Mr Commissioner. There is one affidavit and one statement there. The actual statement is under the hand of the current crown solicitor, Mr Greg Cooper. It's dated 19 April 2013. That outlines the searches that have been undertaken as to what degree or not, as the case may be, by Crown Law into the establishment of the Heiner inquiry. We know there is some evidence that has fallen before the inquiry in that respect.

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COMMISSIONER: Yes.

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MR SELFRIDGE: It addresses the - hand up the original to yourself.

COMMISSIONER: Mr Cooper's affidavit will be exhibit 357.

ADMITTED AND MARKED: "EXHIBIT 357"

COMMISSIONER: What's the effect of it, Mr Selfridge?

MR SELFRIDGE: The effect of it is this, that there's no information or evidence that can be found to support that contention that the crown were contacted and advice was sought and given by the crown in relation to the establishment of the Heiner inquiry. That's the substance of it.

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COMMISSIONER: Thank you.

MR SELFRIDGE: The second of the others, the affidavit as such is under the hand of Noel Newnham, who you'll recall is the former Queensland Police Service Commissioner who gave evidence before the inquiry on 24 and 25 January this year. Just before we - sorry, the last time that the commission sat addressing the terms of 3(e) you yourself gave some comments - and I think that was 14 March - comments as to Mr Newnham's contact with the commission, directly or indirectly, subsequent to the evidence that he gave back in January.

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On behalf of Mr Newnham, he's expressed a desire - and I've since spoken with counsel assisting - that he says he has an intention to seek leave to file an affidavit that addresses those concerns that he's expressed through correspondence, and I'd seek your leave to hand that up to you. The problem we've got just now is twofold: one is that he hasn't dated or placed where he swore the affidavit on this faxed copy, because we've only got a facsimile copy at this point in time, Commissioner, but he's advised us that he has amended the original accordingly and it's in the mail to us, and perhaps we could provide an undertaking to provide that to the commission as an exhibit.

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23/4/13

SELFRIDGE, MR

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COMMISSIONER: I'll accept the exhibit you've got there. I'll give it a number. If I can receive information in any form I think is reliable, I'm content that it's reliable. Does anyone want to cross-examine Mr Newnham on the contents of the affidavit? 1

MR WOODFORD: No, Commissioner.

COMMISSIONER: All right. It will be exhibit 358.

ADMITTED AND MARKED: "EXHIBIT 358" 10

MR SELFRIDGE: Thank you. They're the only two documents we seek to tender.

COMMISSIONER: Thanks, Mr Selfridge. Mr Copley?

MR COPLEY: My submission is that we've now reached the position where we've heard all the evidence that we're going to hear.

COMMISSIONER: Sorry, Mr Harris?

MR HARRIS: Sorry. On 14 March I gave to the commission, and it was marked for identification, exhibit 9. Commissioner, I'd like to turn that into an exhibit. 20

COMMISSIONER: Was that general instructions, was it?

MR HARRIS: General instructions.

COMMISSIONER: Police instructions. Any objection?

MR WOODFORD: No, Mr Commissioner. You may recall that Mr Harris undertook to supply an affidavit going to the fact that the excerpts that he provided were current at the relevant times. He kindly did so so there's no objection to MFI 9 being converted into an exhibit. 30

COMMISSIONER: All right. Well, then in that case MFI 9 will become exhibit 359.

ADMITTED AND MARKED: "EXHIBIT 359"

MR COPLEY: Thank you, Commissioner.

MR WOODFORD: Mr Commissioner, could I also make the observation that there were a couple of reports during the hearing that were cross-examined upon - in particular in relation to Ms Harding, a report of Mr Cooper, this is on day 5, page 4, at about line 5 and thereafter; and a report from a Mr O'Hanley, day 6, page 25, line 50 and thereafter. It appears that they may not have been actually tendered. I just wanted to place that on the record so the other parties were aware of it. 40

23/4/13

COMMISSIONER: Is it proposed to tender them? 1

MR WOODFORD: We'll make inquiries in that regard and perhaps they can be received by the commission as exhibits if in fact they were not tendered, as I suspect they weren't. I don't think anything needs to be done about it at present, just so that everyone is aware of it.

COMMISSIONER: I received them when they're to hand and will provide a copy to the parties with leave.

MR WOODFORD: Thank you. 10

COMMISSIONER: And they'll be published.

MR WOODFORD: Yes. I should comment that when they were cross-examined upon it - I've read the transcript and it appears that everyone was on the same page in the sense that they had access to those materials.

COMMISSIONER: All right.

MR WOODFORD: But in any event, as you've suggested, Mr Commissioner, we'll get them to hand and circulate them and they can be received, perhaps. 20

COMMISSIONER: Thank you. Mr Copley.

MR COPLEY: So having now heard all the evidence that we're going to hear, the only thing remaining is to provide a time for there to be any oral submissions that people might wish to make about paragraph 3(e) and the findings that you should make. Mr Hanger tells me that he's available on Monday, 6 May 2013 to represent the state of Queensland at such a hearing. 30

COMMISSIONER: I'm free.

MR COPLEY: As will I be. We'll wait to hear if Mr Bosscher isn't or Mr Harris isn't, but I'm not sure Mr Harris needs to be involved at that point. But my submission to you, Mr Commissioner, is that in March - well, my submission to you is that the focus of any submissions that people might wish to make to you now should concern the propriety or appropriateness and/or lawfulness of Cabinet's decision to enable the destruction of the documents irrespective of what they contained. 40

That is to say there's no need for there to be any further submissions to you concerning the issue of whether they contained evidence of child sexual abuse. Everybody put their best foot forward on that issue in March; the submissions were received, made exhibits, and will be considered by you when you prepare your report.

23/4/13

COPLEY, MR

COMMISSIONER: I'm happy to work on that basis. If anybody has thought of something that they didn't include about child sexual abuse in their last submissions they can obviously add it, but there's no need to rehearse that issue except by way of additional material that was omitted. Otherwise submissions on term 3(e) will be set down for on Monday, 6 May at 10 am.

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MR COPLEY: Yes, that's right, Commissioner.

COMMISSIONER: Is that suitable to everybody?

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MR BOSSCHER: Suitable other than I point this out, my diary comes up and says it's Labour Day on 6 May.

COMMISSIONER: No holiday, though.

MR BOSSCHER: No holiday, okay. I'm just telling you it's in there. I hadn't noticed, but otherwise I'm free.

MR WOODFORD: You must be free. Mr Commissioner, could I just note that in terms of submissions, in accordance with previous direction that you made, Mr Harris has helpfully supplied written submissions a number of weeks ago - final written submissions concerning the issues of Ms Harding and (indistinct).

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COMMISSIONER: Okay. Mr Harris, do you want to appear on 6 May, or would you prefer to be excused?

MR HARRIS: I think I should appear, Commissioner, and then I'll be able to - I've got to revise the submission I gave to Mr Woodford.

COMMISSIONER: Of course you're welcome to appear and be heard to the extent that you want to participate.

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MR HARRIS: Thank you, Commissioner.

COMMISSIONER: All right. Thank you very much, everybody, for all your assistance in the course of the presentation of the evidence. I look forward to seeing you all on 6 May.

THE COMMISSION ADJOURNED AT 1.38 PM UNTIL
MONDAY, 6 MAY 2013

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23/4/13

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